SYNOPSIS AND INDEX.

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The purpose of the act is plain. Clearly Congress did not intend that the refusal of a carrier upon reasonable request to furnish cars should be justified by the mere failure to have provided such equipment. The Commission is charged by the statute with the duty of determining the administrative questions here involved. That duty it has performed, and it is submitted that the judgment of the district court should be reversed.

TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, et al., Appellants, *v.* PENNSYLVANIA RAILROAD COMPANY, Appellee.	Nos. 340 and 341.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

These appeals are prosecuted by the United States, the Interstate Commerce Commission, and the Crew-Levick Company, a corporation, from a judgment of the District Court of the United States for the Western District of Pennsylvania granting an interlocutory injunction against the enforcement of an order of the Interstate Commerce Commission requiring the Pennsylvania Railroad Co. to provide and furnish tank cars for the shipment of petroleum products. *Pennsylvania Paraffine Works* v. *Pennsylvania Railroad Company*, Docket No. 5574, and *Crew-Levick Company* v. *Same*, Docket No. 5574, Sub. No. 1. The Commission disposed of the two cases in one report, 34 I. C. C., 179, and issued one order covering both complaints, but the Pennsylvania Railroad Co. filed two suits against the United States to enjoin the enforcement of the order. The Com-

mission intervened in both suits. The injunction was granted by Circuit Judge Woolley and District Judge Orr, a dissenting opinion being delivered by District Judge Thompson. *Pennsylvania R. Co.* v. *United States,* 227 Fed., 911.

The Pennsylvania Paraffine Works and the Crew-Levick Company, complainants before the Commission, when referred to jointly in this brief, will be called the complainants, and the Pennsylvania Railroad Company will be referred to as the Railroad.

The complainants, refiners of crude oil, in their complaint before the Commission prayed for an order requiring the Railroad to furnish tank cars, or rather to furnish transportation as required by the act to regulate commerce. The Railroad challenged the power of the Commission to enter such an order, but the Commission decided that it had jurisdiction of the matter in dispute, and entered an order, the material part of which is as follows:

> *It is ordered,* That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.
>
> *It is further ordered,* That said defendant be, and it is hereby, notified and required to

provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

The petition filed by the Railroad in the District Court assailed the order of the Commission upon the following grounds:

I. That neither the act to regulate commerce nor any other law imposes upon the Railroad an obligation to supply tank cars for the transportation of oil.

II. That neither the act to regulate commerce nor any other law confers authority upon the Interstate Commerce Commission to make the order referred to in the petition.

III. That the order requires the Railroad to furnish tank cars for interstate shipments when consigned to points on other lines of railroad, and is in that regard without lawful warrant and in violation of the fifth amendment to the Constitution of the United States.

IV. That the order assumes to require the Railroad to seize all tank cars which happen to be on its line, regardless of their ownership, and to furnish them to complainants, and would therefore subject the Railroad to liability in actions for damages by the owners of such cars, thus causing the order to be unlawful and in violation of the fifth amendment.

V. That the time given for compliance with the order is insufficient, and that the order is in this regard also without lawful warrant and in violation of the fifth amendment.

VI. That the order is uncertain and indefinite.

The findings of fact made by the Commission are not disputed and are substantially as follows, Printed Record, pages 18, 19, 20:

The Pennsylvania Paraffine Works has its office and refinery at Titusville, Pa., and the Crew-Levick Co. operates the Glade Oil Works at Warren, Pa. For two years last prior to the hearing before the Commission the Pennsylvania Paraffine Works had been refining about 20,000 barrels of crude oil per month and the Glade Oil Works from 15,000 to 16,000 barrels per month. During the 10 months of 1913 for which results were shown before the Commission the shipments of the Pennsylvania Paraffine Works averaged over 750,000 gallons per month, and the shipments of the Glade Oil Works over 500,000 gallons per month. Of the shipments made by the Pennsylvania Paraffine Works 91 per cent moved in tank cars, 1½ per cent in barrels loaded in cars other than tank cars, and 7½ per cent in pipe lines, while of the shipments made by the Glade Oil Works 86.8 per cent moved in tank cars, 4.7 per cent in barrels, and 8.5 per cent in pipe lines.

For a long time the bulk of the refined product of petroleum in the United States has been shipped in tank cars, and at present 91 per cent of the refined oil produced in this country is so transported. It was testified before the Commission that the Railroad has been using tank cars for the shipment of oil for more than 25 years.

The tank cars now in common use for the transportation of oil have a capacity of from 6,000 to 12,000

gallons each. These cars are so constructed that they may be rapidly loaded at the refinery, and jobbers and dealers in the refined product throughout the country have the proper and necessary facilities for unloading tank cars by gravity at their various stations.

The only other method of transporting oil by rail is in barrels or similar containers loaded in box cars. The cost to the purchaser of oil transported in barrels is from 3½ to 3¾ cents per gallon above the cost when transported in tank cars. This higher cost is due to the additional weight upon which freight charges must be paid, depreciation in the value of the barrels when used, greater waste than when transported in tank cars, and additional expense of handling and delivering. The addition of 3½ cents per gallon to the cost of oil when transported in barrels makes that method of transportation practically prohibitive, and the refusal of the Railroad to furnish an adequate supply of tank cars would tend to drive out of business refineries which are unable to supply themselves with enough tank cars to move their own products. Even witnesses who appeared before the Commission in behalf of the Railroad admitted that tank cars are an economic necessity for the transportation of refined products.

In 1887 the Railroad acquired 1,308 tank cars, some of which have since been sold to independent refineries. At the time of the hearing before the Commission the Railroad owned 499 tank cars, all that remained of those purchased in 1887, and 482

of which are furnished to shippers of oil located on its lines.

At the time of the hearing before the Commission the Pennsylvania Paraffine Co. owned 54 tank cars and the Crew-Levick Co. 57 tank cars. It was testified that during the five or six years prior to the hearing complainants had made daily inquiry for the delivery of cars to their refineries and that a formal order for cars had constantly been on file in the Railroad's offices at Titusville and Warren.

On November 11, 1912, shortly prior to the filing of the complaints before the Commission, complainants served the Railroad with formal notices requesting it to furnish a sufficient number of tank cars to ship, respectively, 450,000 gallons of oil per month from the Pennsylvania Paraffine Works refinery at Titusville and 600,000 gallons per month from the Glade Oil Works at Warren. To this request the Railroad's answer, through its general manager, was as follows:

> We beg to say that the railroad company is not prepared to increase its present tank-car equipment, but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair and reasonable and nondiscriminatory.

In its answer before the Commission the Railroad alleged that while it publishes rates on oil and gasoline in bulk, it publishes in its tariffs the statement that *it does not assume any obligation to furnish tank cars.*

A majority of the Commission, after full consideration, found that the act requires every interstate carrier upon reasonable request therefor to furnish cars for interstate shipments and that the requests of the complainants for tank cars for the shipment of oil were reasonable, and should be granted.

The two judges who issued the injunction were of the opinion that the act to regulate commerce imposes upon a carrier no duty to *provide* cars for the movement of its normal traffic, but merely requires the carrier to furnish without discrimination such cars as it is able to furnish from its available supply. District Judge Thompson, dissenting, was of opinion that the act imposes upon a carrier the duty to *provide and furnish* upon reasonable request such cars as are reasonably necessary for the movement of the normal traffic which it undertakes to carry, and that it is the duty of the Commission upon complaint to determine the reasonableness of a shipper's request for cars, the ability of the carrier to procure cars being one of the elements to be considered in determining that question.

ARGUMENT.

I.

It is the duty of every interstate carrier to provide and furnish upon reasonable request such cars as are reasonably necessary for handling the normal traffic of which it is a common carrier.

(*a*) *The act to regulate commerce requires carriers to furnish cars upon reasonable request.*

The first section of the original act to regulate commerce, merely provided that the term "transportation" should include "all instrumentalities of shipment or carriage," without any provision that such transportation should be provided or furnished upon request. By the amendment of June 29, 1906, known as the Hepburn Act, however, it was provided that "the term 'transportation' shall include *cars and other vehicles and* all instrumentalities *and facilities* of shipment or carriage," the words italicized being inserted by the amendment, and the following words being added:

> * * * irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to *provide and furnish* such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. [Italics ours.]

The word "provide" as here used is significant. The Standard Dictionary defines the word as follows: "To make, procure, or furnish for future use; obtain so as to have ready or on hand when needed; prepare, as, to *provide* food for the journey." Another definition given is: "To furnish with supplies or prerequisites; put into a state of preparation; as, we are well *provided* with money."

It is the duty of every carrier under the act to *provide* and *furnish* such transportation upon reasonable request therefor. In other words, it is the duty of every carrier to provide and furnish "cars and other vehicles, and all instrumentalities and facilities of shipment, or carriage, irrespective of ownership," upon "reasonable request therefor." The only limitation is the "reasonableness" of the request.

The use of the two words "provide" and "furnish" in the act is for a purpose.

> Every word in a statute must be given a meaning, if not in conflict with general intent.—Sutherland on Statutory Construction, sec. 380.

The two words *provide* and *furnish* are not synonymous, and impose the positive duty upon the carrier of reasonably equipping itself with facilities and the further duty of furnishing those facilities to shippers upon reasonable request.

In other words, the carrier must *prepare* to furnish, and must then *furnish* upon reasonable request, such cars as are reasonably necessary to supply the demand that may be expected; and when reasonably requested to furnish cars it will not be heard to say

that it has not prepared itself to furnish cars which it had reasonable ground to believe that it would be called upon to furnish.

In *Scofield et al.* v. *Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C., 90, 117, decided before the amendment to section 1 referred to above, complainants sought to compel the defendant carriers to furnish tank cars for the shipment of oil, but the Commission, holding that the duty of a carrier to provide cars was not a duty imposed by the act, denied the relief sought for the reason, as stated, that—

> The statute does not undertake to clothe the Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings.

This decision was reported to Congress, and it must be presumed that in the enactment of the Hepburn amendment expressly imposing upon carriers the duty to *provide and furnish* cars upon reasonable request, Congress had in mind the decision of the Commission last cited. The amendment imposing the duty to provide and furnish cars must, therefore, have been intended to supply the defect in the power of the Commission which that body had found to exist, as well as to enlarge the then existing common-law duty of carriers to provide and furnish cars. The definition of "transportation" in the original act may have been sufficient to include cars, but the duty

to provide and furnish *transportation* as defined was not imposed by the act prior to the Hepburn amendment.

(*b*) *It is the legal duty of the carrier to furnish the character of cars reasonably necessary for transporting the particular traffic which it offers to carry.*

That a common carrier may be required to furnish a sufficient number of cars to take care of its ordinary and usual traffic is elementary. *Houston & Texas Central R. Co.* v. *Mayes*, 201 U. S., 321, 331; *Chicago, R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S., 426; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S., 140; *Pennsylvania R. Co.* v. *Puritan Coal Co.*, 237 U. S., 121, 133.

This doctrine is not denied by the Railroad. Its contention is that no duty rests upon it to furnish a certain kind of cars or equipment. The determination of this question however depends upon whether such equipment is one of the facilities of transportation which the act declares a carrier must furnish. The duty of providing transportation is not fulfilled when any kind of a car is furnished a shipper. It must be adequate to the reasonable needs of the shipper. It would not be contended that a carrier could dispense with all its box cars and meet the requirements of the act by furnishing flat cars or gondolas to shippers of perishable freight. And when a commodity requires a special kind of car for its shipment, and this requirement has been recognized for more than 25 years by the use of such special equipment, a carrier to which such traffic is offered

has not fulfilled its duty until it has furnished adequate facilities for handling it.

It is argued that tank cars are of such unusual and peculiar construction that they can not be used for other traffic, and that therefore the carrier can not be required to furnish such special facilities unless it elects to do so. The petition, however, does not question the finding of the Commission as to the general and long-continued use of tank cars for the shipment of petroleum in bulk, or the finding of the Commission that tank cars are an economic necessity for the shipment of refined products of petroleum. The finding of the Commission that the railroad publishes rates for the shipment of oil in tank cars is also undisputed. If tank cars had not long been in general use for the shipment of oil, and if the Railroad had never held itself out as a common carrier of oil in tank cars, there might be some plausibility in the contention that the carrier can not be required to supply itself with such cars, but there is no room for such a contention, when 91 per cent of the refined oil of the country is carried in such cars, and it is conceded that the railroad has long published rates on oil carried in tank cars, and has itself furnished tank cars for such shipments.

The facilities furnished by the carrier must be such as are reasonably required for the handling of the traffic which it offers to carry, and the fact that a particular kind of traffic requires facilities which are not required for other kinds of traffic furnishes no reason why the carrier should not furnish such

facilities, if it holds itself out to the public as a common carrier of traffic of that kind.

In *Oregon R. R. Co.* v. *Fairchild*, 224 U. S., 510, 529, the court said:

> If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though "the furnishing of such necessary facilities may occasion an incidental pecuniary loss."

In *Covington Stock Yards* v. *Keith*, 139 U. S., 128, 133, Justice Harlan said:

> The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the places to which it is consigned. The vital question in respect to such matters is whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public.

This vital question, prescribed by Justice Harlan as the test of the carrier's duty, is to be answered in the first instance by the Commission.

Again, at page 135 the court, in the case last cited, said:

> The carrier must at all times be in proper condition both to receive from the shipper

and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered.

(c) *The common-law duty of carriers to furnish adequate equipment is not restricted by the act to regulate commerce.*

The duty to furnish cars which rested upon carriers at common law was the duty to furnish a sufficient number of cars for their usual and ordinary traffic. *Houston & Texas Central R. Co.* v. *Mayes*, 201 U. S., 321, 331. And it was no defense to an action at common law to recover damages for failure to perform that duty that the carrier had not supplied itself with a sufficient number of cars to enable it to perform the duty. If the normal traffic of the carrier required a certain kind or number of cars, and it negligently or wilfully failed to procure such cars when by the exercise of reasonable care it might have done so, it could not escape liability by showing that it did not have the cars.

We submit that there is no reasonable basis for the suggestion by counsel for the Railroad that the common-law duty of a carrier was restricted by the act to regulate commerce. No reason therefor appears in the circumstances surrounding its passage. There was no intimation of a policy to lighten the burdens which the common law imposed upon carriers. The statute was enacted primarily for the benefit of shippers.

The only justification for a theory that the common-law duty to furnish transportation was limited in the act would be words of limitation in the statute itself. But there are no such words of limitation.

It can not fairly be contended that the common-law duty of carriers in this regard exceeded the duty imposed by the words of the act—

> * * * to provide and furnish cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership * * * upon reasonable request * * *

The common-law duty of carriers to provide facilities of transportation is a duty extending to any kind of equipment that is reasonably necessary for hauling the special character of freight. In Ray on Freight Carriers, section 4, page 17, it is stated:

> A railway company is bound to provide cars reasonably fixed for the conveyance of the particular class of goods it undertakes to carry. It is the duty of the carrier to provide suitable means of transportation adapted in each case to the particular class of goods he undertakes to transport.

In *Baker* v. *Boston & M. R. Co.*, 65 Atlantic Reporter, 386, 390, it was held that it was the defendants' duty to provide suitable cars in which to transport *milk*.

In *State* v. *Florida East Coast Ry. Co.*, 50 Southern Reporter, 425, 427, it was said:

> The duty of a railroad company to furnish reasonably adequate facilities is commen-

> surate with the powers and privileges conferred upon the corporation and the just requirement of the public to be served by it. In determining the obligation of the corporation in the discharge of its duties to the public, the corporate business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should be considered.

In *St. Louis, I. M. & S. Ry. Co.* v. *State*, 104 Southwestern Reporter, 1106, 1107, it was held that a carrier is bound to furnish facilities for receiving cotton at its stations, and if its platforms are filled, that it must furnish *additional* platforms or respond in damages. The court said:

> In this case it appears from the evidence—at least the evidence warrants the conclusion—that sufficient platform facilities for receiving cotton were not provided by appellant. During the cotton-shipping season of 1905, the platform was insufficient to hold the amount of cotton ordinarily on hand awaiting transportation. When this cotton was offered for shipment, the platform was covered with cotton from one to three bales deep, necessitating unusual trouble and expense in putting more upon the platform. This was an extraordinary expense which the carrier should have borne, instead of imposing it upon the shipper, as it was the fault of the carrier that more abundant facilities had not been provided. Nor was it a defense to show that an unusual emergency had caused a shortage of cars so that cotton could not be shipped out as rapidly as customary.

In Hutchinson on Carriers, 3d edition, section 505, the rule is thus stated:

> If the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier where he accepts the goods to provide such cars for their carriage.

In *Beard* v. *Railway Co.*, 79 Iowa, 518, 521, the Supreme Court of Iowa held that if *improved cars* for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying *butter*.

In *Merchants' Dispatch Co.* v. *Carnforth*, 3 Colorado, 280, it was held that the carrier must furnish special cars adapted to the shipment of *oranges and lemons*.

In *St. Louis, I. M. & S. Ry. Co.* v. *Renfroe*, 100 Southwestern Reporter (Arkansas), 889, 891, it was held that it was the duty of the carrier to provide suitable cars for the shipment of *strawberries*.

Likewise, it is the duty of the carrier to furnish a special kind of cars for the shipment of *live stock*. Hutchinson on Carriers, 3d edition, section 509.

Under its common-law duty a carrier must furnish the proper and reasonable equipment for freight offered it for transportation, and even though this can not be done except by the purchase and installation of additional equipment, the carrier is not thereby relieved from its plain duty. The act to regulate commerce imposes upon the carrier the same obligation.

Indeed, we see no hardship imposed upon a carrier because in the expansion of its traffic new equipment becomes a necessity. In the case at bar it is only additional equipment, but if the Railroad owned no single tank car its duty would be the same. This is not an isolated offer of a shipment, but the undisputed proof shows that the shipments to transport which cars are requested normally amount to more than a million gallons of oil per month.

If some novel device unfamiliar to railroad transportation, used in rare instances, or subject to the whim of a shipper, were under consideration, the Railroad might have some just complaint.

But the conditions presented are very different. A great commodity of commerce is being regularly transported. Ninety-one per cent of the bulk of this commodity is transported in the particular equipment under consideration. This particular equipment has been in general use for transporting this commodity for 25 years. The Railroad has owned and still owns cars of the design required. It admits that it has not sufficient cars to transport the commodity offered it for shipment. It refuses to provide itself with a sufficient number of such cars; and it attempts instead to place upon the purchaser the burden of paying an additional cost of 3½ cents per gallon.

It appears of record in this case that the Railroad at one time owned 1,308 tank cars. Many of these cars were sold, and at the time of this hearing the Railroad owned 499 tank cars.

If the Railroad, by selling some of its tank cars, could relieve itself of its legal obligation to provide and furnish such equipment, it could dispose of the remaining 499 tank cars, and a shipper and the Commission would, under the doctrine contended for by counsel for the Railroad, be powerless. Indeed, according to that argument, there would be no reason for the carrier to stop after selling its tank cars. It might sell off all its other equipment and would have no duty to furnish a shipper cars except such as it might not have sold and which it might have on hand.

The act to regulate commerce was intended to add to rather than to take from the common-law duties of carriers, and nothing short of a clear expression of intention to limit or restrict a particular common-law duty of carriers could authorize the conclusion that such a limitation or restriction was intended.

In *Chicago, Rock Island & Pacific Ry.* v. *Hardwick Elevator Co.*, 226 U. S., 426, 434, the court by Mr. Chief Justice White held a statute of Minnesota requiring carriers to furnish cars for interstate shipments to be unconstitutional because Congress had exerted its paramount authority over the subject. After quoting the declaration of section 1 of the act to regulate commerce that the word "transportation" shall include cars, and that "*it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor,*" the court said:

> The purpose of Congress to specifically impose a duty upon a carrier in respect to the

> furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement section 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections "shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." Not only is there, then, a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty.

Other cases are to the same effect. *Yazoo & M. V. R. R. Co.* v. *Greenwood Grocery Co.*, 227 U. S., 1; *St. L., I. M. & S. Ry. Co.* v. *Edwards*, 227 U. S., 265; *Hampton* v. *St. L., I. M. & S. Ry. Co.*, 227 U. S. 456.

In none of the cases cited was there any suggestion that the duty to *provide and furnish* transportation imposed by the act is less extensive than the common-law duty to furnish transportation, and it seems that the word "transportation" as defined in the act includes some elements which the common-law duty to furnish transportation did not include.

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S., 588, 594, decided January 10, 1916, in an opinion by Mr. Justice Pitney, the court held that the word "transportation" as de-

fined in the act was intended to include the responsibility of the carrier as warehouseman, and after quoting the provision of the Hepburn Act which we are considering, the court said:

> From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the act respecting reasonable rates and the like.

In *Union Pacific R. Co.* v. *Hall et al.*, 91 U. S. 343, 355, this court awarded mandamus to compel the Union Pacific Railroad Co. to operate its road as a continuous line as required by its charter.

The power to require a common carrier by railroad to operate its road implies the power to require it to acquire cars for that purpose, since the carrier might otherwise defeat any judgment rendered in the exercise of that power by refusing to provide cars for the conduct of its ordinary business.

In *Penn Refining Co.* v. *West N. Y. & P. R. Co.*, 208 U. S. 208, this court, by Mr. Justice Peckham, held that the Commission had erred in finding that a

carrier had unduly discriminated against a shipper of oil in barrels by charging him for the weight of the barrel package while making no charge for the weight of the tank car when the oil was shipped in such cars, and the carrier was not prepared to supply the complaining shipper with tank cars upon demand. The court, in this connection, at page 221 said:

> We are unable to concur in this view. Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one), while none is made for the tank containing the oil. *It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand.* [Italics ours.]

While the court further said in that case that it was not called upon to determine whether or not the carrier could have been required to furnish tank cars upon demand, we think the reasoning of the court indicates that it was of opinion that such a duty existed even at the time of the shipments there involved, which was prior to the amendment to the act declaring the duty to furnish cars upon reasonable request therefor.

It is urged by counsel for the Railroad that because the duty of a carrier to furnish cars for the movement of traffic over a lateral branch line of railroad with which it has been required to construct and operate

a switch connection is restricted by the use of the words *to the best of its ability*, and because other duties of carriers declared in the act are restricted by the use of similar words, the court must add to the requirement to provide and furnish transportation a like restriction. But even if that be conceded it does not follow that the carrier is to be the final judge of its ability to provide and furnish the transportation requested, or that the Commission can not determine that question of fact. There is no claim here that the Railroad is not able to provide tank cars, the defense being that cars of that type are not necessary for the movement of oil. The Commission, however, has found that such cars are reasonably necessary for that purpose, and it is not alleged that this finding of fact is not supported by substantial evidence. The Railroad claims that it is not *ready* to furnish the cars requested; in other words, it has failed to *provide* as required by the act, and it argues that for this reason it is not *able* to furnish such cars and therefore can not be required to furnish them.

It is useless, however, to consider the meaning of the words *to the best of its ability* or the meaning of similar words used in declaring other duties than the duty to furnish transportation, for the use of such words in other connections and the failure to use them in declaring the duty of carriers to provide and furnish transportation implies *that no such restriction was intended as to the duty to provide and furnish transportaion.*

(*d*) *Shippers may compel carriers to furnish adequate cars.*

If the railroads were the final judges of the kind and number of cars they will provide, shippers would be entirely at their mercy, and when a producer or manufacturer should have located his plant on a railroad he could have no assurance that the carrier would continue to provide and furnish the equipment which his product might require. Nor could he afford to buy equipment for the reason that he could have no right to use it so long as the carrier might choose to provide its own equipment, and the carrier would be free to change its *practice* as to that matter from time to time as it might elect.

In *Atchison Railway Co.* v. *United States*, 232 U. S., 199, both the shipper and the carrier had contended for the privilege of icing cars for the shipment of fruit. This court held that practices relating to refrigeration, which is defined as a part of transportation, were within the control of the Commission, and sustaining the order of the Commission, said, page 214:

> Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars and can not be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers can not be expected to prepare to meet the

> demand and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another.

It seems to follow that if the carrier can not be required to accept the facilities for refrigeration which the shipper offers, which must include refrigerator cars, the shipper must have the right to compel the carrier to furnish such cars, since the same reasons which *entitle* the carrier to furnish such cars must *compel* him to do so, as the shipper can not be expected to supply himself with equipment if he does not know whether or not the carrier will permit it to be used.

That Congress intended that the shipper should have the right to look to the Railroad alone for everything included in transportation as defined in the act, is shown by the debate in the Senate upon a proposed amendment providing that private car companies should be deemed common carriers. That proposed amendment was rejected, and we may assume that its rejection was for the reasons urged against it in debate. The following extract is from the debate in the Senate on May 7, 1906, Congressional Record, volume 40, page 6438:

> Mr. CLAPP. * * * One difficulty to-day is that the shipper of fruit and other freight requiring refrigeration has to deal not only with the railroad company which transports that freight, but also he has to deal with the company owning these private cars; and while

it did not seem a bit feasible, if advisable, to eliminate the private cars, it did seem as though we ought to take one step forward and require the common carrier to furnish these cars, so far as the shipping public is concerned, so that the shipper would have to deal only with one corporation, and that would be the carrier, and the carrier would be free either to buy its cars, own its cars, rent its cars, or employ the cars owned by the private car line companies so long as in its last analysis the cost of transportation, including refrigeration and those things especially inherent in the private cars, was within the control of the Interstate Commerce Commission, and the shipper had to deal only with one person, and the Commission had to deal only with one person, and that the common carrier. So we provided first as to what a carrier—a railroad—should be, what transportation should be, bringing refrigeration, icing, and all these matters finally under the one head of transportation or freight so that it would simplify the subject both with the shipper and the Commission.

* * * * *

I hope before the Senate thus, within the purview of this law, legalize the operation of the private-car lines they will consider if it is not better, for the time being at least, to place every item of transportation subject to the railroads, so that the shipper and the Commission will have to deal primarily and exclusively with the railroad company alone.

The question before Congress, as appears from the debates, was whether the private car companies should be subject to the act so that the Commission might regulate their charges and have the power to remove discrimination by them in the distribution of their cars, or whether the railroads should be required to furnish cars of special types such as are owned by the private car companies, and it was decided that it would be wiser to impose upon the railroads the duty to provide and furnish cars, and give the Commission control over the cars through control over the railroads, leaving the railroads free, however, to obtain cars by lease or rental from the private car companies. Congress manifestly concluded that the carrier ought not to be free to compel the shipper to look to the private car companies for equipment of that type and thus make it necessary for the shipper to contract with persons other than the carrier for that element of transportation, when such persons would be under no obligation to furnish such equipment, and might discriminate at will between shippers. Congress therefore amended section 1 of the act so as to impose upon the carrier the duty of *providing* and furnishing cars upon reasonable request.

In *Missouri, Kansas & Texas Railway Co.* v. *Harris*, 234 U. S., 412, 418, the court, through Mr. Justice Pitney, said:

> So in *Chicago, R. I. &c. Ry.* v. *Hardwick Elevator Co.*, 226 U. S., 426, it was held that since by the Hepburn Act, Congress had

> legislated concerning deliveries of cars in interstate commerce by carriers subject to the act, specifically requiring the carrier to provide and furnish "transportation" (cars being embraced within the definition of the term) upon reasonable request, the authority of the State of Minnesota to legislate upon the subject of the delivery of cars when called for to be used in interstate traffic was superseded.

In *Ellis* v. *Interstate Commerce Commission*, 237 U. S., 434, the court, through Mr. Justice Holmes, at page 443, said:

> The Armour Car Lines is a New Jersey corporation that owns, manufactures, and maintains refrigerator, *tank*, and box cars, and that lets these cars to the railroad or to shippers. * * * It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the *carriers* shall furnish them upon reasonable request, * * *. [Italics ours.]

The effect of the decision of the court below is that the shipper, if he owns no tank cars, must contract with some private car company for the cars needed for his shipments, thus making it necessary for the shipper to deal with another than the carrier for one of the essential elements of transportation as defined in the act.

If the shipper is dependent upon private car companies for the cars he needs, then he must pay what-

ever such companies demand for the use of their cars, and if they choose to let his competitors have all their cars he is helpless, the Commission having no control over the charges of such companies and no power to require them to desist from discrimination.

(e) *The duty of the carrier to furnish adequate equipment is not abrogated by the carrier's giving notice in its published tariffs that it will not furnish cars.*

It is true the Railroad announces in its tariffs that it does not assume the duty to furnish tank cars, but a railroad company can not in that way abrogate the provisions of the statute. The Railroad, with equal claim of lawfulness, might publish tariffs for the transportation of any other class of freight and announce in such tariffs that it does not assume the duty to furnish *cars* therefor. The law makes it the duty of the carrier to "*provide and furnish*" cars upon reasonable request, and the carrier can not relieve itself of that duty either in whole or in part by announcements in its published tariffs.

The notice thus given in the tariffs merely confirms the view that the refusal to furnish tank cars is a practice the reasonableness of which is for the Commission to determine. The *publication* of the notice emphasizes the *unreasonableness* of the practice whereby shippers owning no tank cars are compelled to ship in barrels, and are for that reason unable to compete with shippers to whom tank cars are furnished by the Railroad.

Besides, the public is interested, and, as said in *Atchison Railway Co.* v. *United States*, 232 U. S., 199, 217, "neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay."

II.

The Interstate Commerce Commission is charged with the duty of enforcing the provision of the act requiring carriers upon reasonable request to provide and furnish cars for interstate shipments.

(*a*) *Failure to furnish cars may be the subject of complaint before the Commission under section 13 of the act.*

There is no escape from the conclusion that the failure of a carrier to provide and furnish cars upon reasonable request therefor is something omitted to be done by the carrier in contravention of the provisions of the act, and therefore an omission which may be made the object of a complaint under section 13, the first clause of which reads as follows:

> That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts.

By other provisions of section 13 it is made the duty of the Commission to investigate complaints

under that section and to make appropriate orders relating to the matter or things concerning which the inquiry is had. It being clear, therefore, that the failure to furnish cars is a matter of which complaint may be made under section 13 of the act, it follows that the Commission has power to make any order that may be appropriate to the enforcement of the duty which the carrier has failed to perform. Besides, section 15 expressly makes it the duty of the Commission, when it has found any practice complained of affecting interstate traffic to be unreasonable or otherwise in violation of the act, to find and prescribe what would be a reasonable practice in the matter investigated and to make an order requiring the carrier to desist from the unreasonable practice prescribed. That duty is imposed by the first paragraph of the section in the following language:

> That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of

such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(*b*) *The reasonableness of a request of a carrier for transportation facilities is a question of fact within the primary jurisdiction of the Commission.*

It is important that some administrative board should have the power to determine questions of reasonableness as between the public and the carriers. As to certain matters Congress has prescribed absolute rules, as in the case of safety appliances with which cars are to be equipped. As to other matters the rule can not be absolute because of varying con-

ditions, some of which can not be anticipated, and as to such matters the carriers are required to be reasonable. What is reasonable, however, is a matter about which men may differ, and it is unthinkable that carriers under the act may be required to do only what *they* may deem to be reasonable, thus making them the final judges of the services which they shall render.

That Congress did not intend to make the carriers the final judges of what is a reasonable request for transportation, is evident from the express provision in the act whereby the determination of such matters is entrusted to the Interstate Commerce Commission.

The requirement to provide and furnish transportation *upon reasonable request* is not an absolute requirement to provide and furnish cars. The reasonableness of the shipper's request depends not only upon his needs but also to some extent upon the carrier's ability to *provide* the cars requested. Upon a complaint that the carrier has failed to provide cars as requested it is the duty of the Commission to consider all the elements which enter into the determination of the reasonablenesss of the shipper's request.

In *Chicago, Rock Island & Pacific Ry.* v. *Hardwick Elevator Co.*, 226 U. S., 426, *supra*, the court held that the various provisions of the act giving remedies for the enforcement of its provisions applied to the enforcement of the duty to provide and furnish cars.

In *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S., 70, the carrier had refused to accept interstate shipments of liquor consigned to certain points in Kentucky because a Kentucky statute prohibited shipments of liquor to such points. It was argued by the carrier that the shipper should have gone to the Interstate Commerce Commission for relief rather than to the courts, but this court, at page 83, noted that there was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities, and held that as the case did not turn upon any administrative question there was nothing for the Commission to determine.

The court there clearly recognized the primary jurisdiction of the Commission to determine all questions as to the sufficiency of the carrier's transportation facilities.

In *Pennsylvania Co.* v. *United States*, 236 U. S., 351, 362, the court by Mr. Justice Day, after quoting the provision of the amendment of 1906 defining transportation, at page 363, said:

> By the amendments to the act, the facilities for delivering freight of a terminal character are brought within the terms of the transportation to be regulated.

Whether the request of a shipper upon a carrier to furnish cars is a *reasonable* request is an administrative question as much within the primary jurisdiction of the Commission as a question regarding the reasonableness of rates.

As to the reasonableness of rates, the court held in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, that the primary interference by the courts with the administrative functions of the Commission was wholly incompatible with the purposes of the act to regulate commerce, and in *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U. S., 481, 494, the court held that the same principle applied to the practices of carriers in the distribution of coal cars. To illustrate the confusion which would result from allowing the courts to pass primarily upon such questions, the court in the latter case said:

> A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be

> susceptible of being set aside by the action of a mere administrative body.

That was a case of inequality in the distribution of cars on hand, but the act gives the Commission as full power to determine the reasonableness of a carrier's refusal to provide and furnish cars as it does to determine whether or not inequalities in the distribution of cars are unduly preferential or discriminatory.

In *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S., 247, 255, the court, through Mr. Justice Lamar, said:

> The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.

Continuing, at pages 256 and 257, the court said:

> It is argued that this conclusion ignores sections 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the *Abilene* case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would

> repeal the many provisions of the statute requiring uniformity and equality. * * *
>
> But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice.

In *Morrisdale Coal Company* v. *Pennsylvania R. Co.*, 230 U. S., 304, 313, the court, through Mr. Justice Lamar, said:

> These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the *Pitcairn case*, 215 U. S., 481, and in *I. C. C.* v. *Illinois Central*, 215 U. S., 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If

> in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars neither can it do so as an incident to an action for damages.

In *Pennsylvania Railroad Co.* v. *Clark Coal Co.*, 238 U. S., 456, 468, 469, the court, through Mr. Justice Hughes, said:

> The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon. *Inter Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S., 452; *Same* v. *Chicago, &c., R. R.*, 215 U. S., 479; *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S., 304, 313; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S., 121, 131. Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule. * * * Rules as to car distribution that are unjustly discriminatory are within the purview of section three, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the act and their ascertainment is within the scope of the Commission's authority.

Loomis v. *Lehigh Valley R. Co.*, 240 U. S., 43, was an action brought against the carrier in a New York court to recover damages for the failure of the

defendant to furnish adequate cars for transporting in bulk wheat, oats, rye, apples, cabbages, and potatoes. A shipper requestd 200 cars suitable for transporting produce in bulk. The carrier instead sent ordinary box cars inadequate for the service until fitted with inside doors. The shipper constructed these doors and brought suit without prior resort to the Commission. This court held that the question as to the character of equipment which it was the duty of a carrier to furnish was an administrative question which the Interstate Commerce Commission must primarily determine. Speaking through Mr. Justice McReynolds, the court, at page 50, said:

> In the last analysis the instant cause presents a problem which directly concerns rate making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 232 U. S., 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See *Penna. R. R. Co.* v. *Puritan Coal Co., supra*, pp. 128, 129; *Penna. R. R. Co.* v. *Clark Coal Co., supra*, pp. 469, 470.
>
> If in respect of interstate business the courts of New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has

> been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted.

In *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S., 87, it was held that the courts could not determine matters of discrimination between carriers or shippers or the matter of giving or refusing joint traffic arrangements involved in an indictment until those matters had first been passed on by the Interstate Commerce Commission, and in that connection the court, after citing *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, *supra*, said (108):

> The purpose of the interstate commerce act to establish a tribunal to determine the relation of communities, shippers, and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

It is conceded that the Commission may require the carrier to desist from discriminatory practices in the distribution of *cars on hand*, but it is insisted that this is the full extent of the control of the Commission over the carrier's car supply. But no such limitation

is found in the act. The questions of reasonableness and discrimination are so bound up together that the Commission must have full power over both if discrimination is to be effectively prevented. Many practices are unreasonable because they make discrimination easy, and yet very difficult to detect. If a carrier is to be permitted to determine without control the extent to which it will *prepare* to *furnish* tank cars for the shipment of oil, it may supply itself with tank cars when the shipper whom it desires to favor needs them, and refuse to prepare to furnish such cars when the competitor of that shipper needs them, thus depriving the competitor who has no tank cars of his own and can not procure such cars of his right to ship his oil on equal terms.

In view of the fact that 91 per cent of the refined oil of the country is shipped in tank cars, the refusal to furnish tank cars for the shipment of oil in bulk is just as unreasonable as would be the refusal to furnish cars suitable for the shipment of grain or coal in bulk. Discrimination created by the unequal distribution of cars on hand is comparatively easy to detect and reach, but if a railroad should be permitted to determine finally the extent to which it would prepare to furnish cars the most flagrant discriminations would surely result which neither the Commission nor the courts would be able to reach. *The most effective way to prevent discrimination is to remove the opportunity for discrimination.*

(c) *Even if a shipper could bring a damage suit in court for the failure of a carrier to furnish cars, it would not follow that the Commission would be without jurisdiction to require the carrier to provide and upon reasonable request to furnish such equipment.*

It is clear that the question as to whether or not it is reasonable to require a carrier to furnish for the shipment of a particular commodity a particular type of car is an administrative question into the determination of which many elements enter which a body like the Commission is better fitted to determine than the courts. What would be fair to both parties under the circumstances must be considered. Besides, if one court should determine upon the application of one shipper that the carrier must furnish tank cars for the shipment of oil and another court should determine upon the application of another shipper that no such duty rests upon the carrier, the evils pointed out by the court in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, and *Baltimore & Ohio R. R.* v. *Pitcairn Coal Co.*, *supra*, as resulting from the primary interference by the courts with the administrative functions of the Commission would result.

In *Pennslyvania R. Co.* v. *Clark Coal Co.*, 238 U. S., 456, the Commission found a car distribution rule unjustly discriminatory under section 15, and further found the rule itself administered by the carrier so as to cause unjust discrimination. The shipper then sued

in a state court and recovered treble damages under a state statute. In reversing the judgment of the state court this court, at page 471, said:

> It is said that the present action is brought to recover damages caused by the violation or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it is urged, was held in *Penn. R. R.* v. *Puritan Coal Co.*, 237 U. S., 121. * * * The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case it had done so. It went before the Commission with its complaint under the act assailing the rule of the company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the federal statute.

In *Pennsylvania R. Co.* v. *Puritan Coal Co.*, 237 U. S., 121, 128, this court said:

> It will be seen that this section [9] does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts.

(*d*) *The jurisdiction of the Commission extends to all the things included in the definition of the word transportation.*

The jurisdiction of the Commission to enforce the duty of the carrier to provide and furnish transportation must exist as to all the things included in the word transportation or as to none. That such jurisdiction does exist as to the duty to provide and furnish refrigeration was held by the court in *Atchison Railway Co.* v. *United States, supra,* and it should not be arbitrarily assumed that Congress intended to give the Commission jurisdiction to enforce that duty and yet intended to deny to the Commission the power to require carriers to provide and furnish cars upon reasonable request. In *Arlington Heights Fruit Exchange* v. *S. P. Co.,* 20 I. C. C., 106, 117, in which the order approved in *Atchison Railway Co.* v. *United States, supra,* was entered, the Commission said:

> During the last season 40,000 carloads of citrus fruits moved from California to eastern markets, and during the present year that number will probably be increased to 50,000 cars. During many months nearly one-half of the entire eastern movement upon at least one of these transcontinental lines is made up of oranges and lemons. This vast tonnage should be handled in the most economical and satisfactory manner, and these carriers should furnish for that movement such cars as will effectuate that purpose. They have a right to insist upon a proper compensation for supplying that equipment, but they have no right

to say that old methods must continue in use and new methods held in abeyance rather than change the form of their cars.

III.

The refusal of the Railroad to provide a reasonable number of tank cars for the shipment of oil is a regulation or practice within the meaning of section 15 of the act to regulate commerce.

It is said, however, that even though Congress may have intended to confer upon the Interstate Commerce Commission the power to make an order to require a carrier to *provide and furnish* cars, the power to make such an order is not conferred by section 15 of the act, and that the only remedy for the enforcement of such an order would be a civil proceeding, since the penalty prescribed by section 16 of the act for failing to obey an order of the Commission applies only to orders made under section 15.

The contention is that section 15 does not authorize the Commission to make such an order as that which is here attacked; that the only kind of an order which the Commission is authorized by that section to make is an order requiring a carrier to cease and desist from the charging of an unreasonable or discriminatory rate, or from an unreasonable or discriminatory regulation, practice, or classification; and that the thing from which petitioner is required to cease and desist is not a regulation, practice, or classification or the charging of an unreasonable rate.

The Standard Dictionary defines the word "practice" thus: "Any customary action or proceeding re-

garded as individual; habit;" "an established custom; a prescribed usage;" "the act or process of executing or accomplishing; the use of means to attain an end; doing or performance, as distinguished from theory, conception, or conjecture."

In regularly refusing to assume any obligation to furnish tank cars, the Railroad makes a *practice* of not furnishing such cars. This is evident from the announcement in its published tariffs that it *does not assume any obligation* to furnish tank cars.

Moreover, there is no allegation in the petition that the Railroad's refusal to furnish tank cars upon reasonable request is not a regulation or practice, and no allegation that the finding of the Commission that the Railroad does make a practice of refusing to provide and furnish a sufficient number of tank cars for the normal shipments of complainants is not supported by substantial evidence.

The fourth paragraph of section 1 of the act makes it the duty of common carriers—

> to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * facilities for transportation * * * and all other [related] matters * * * which may be necessary or proper to secure the safe and prompt * * * transportation * * * of property * * * upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice * * * is prohibited and declared to be unlawful.

Under the definition in the second paragraph of section 1 the term "transportation" as heretofore noted is made to include—

> cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *.

The practice from which the Railroad is required to cease and desist is the refusal to provide and furnish upon reasonable request tank cars for the shipment of petroleum products.

The case of the *Atchison, T. & S. F. Ry. Co.* v. *U. S.*, 232 U. S., 199, involved what is admitted to be a practice within the scope of section 15. In that case the practice was the icing of cars. There is no distinction in principle between furnishing of refrigeration for the transportation of fruit and the furnishing of tank cars for the transportation of petroleum products.

IV.

The order of the Commission is not void for uncertainty.

The order requires the carrier on or before a certain date to provide tank cars sufficient to move the *normal shipments* of complainants, and *thereafter* to furnish such cars upon reasonable request.

The order follows the language of the act. The Commission has found that the volume of complainants' shipments in the past has been such as to justify the demands for equipment made by

complainants. The Commission thus finds that complainants have already made a reasonable request of the Railroad to "provide" tank cars, and the cars which are to be provided under the order are to be furnished upon reasonable request. The requirement to furnish cars sufficient for the "normal shipments" of complainants is as definite as the order could have been made, and the Commission has pointed out in the report what this means. "Normal shipments" are in effect defined to be those which are reasonably to be anticipated in the light of past demands. *Until the Railroad has made some effort to comply it can not complain that the order is not more definite.*

The Railroad has not attempted to provide tank cars for the normal shipments of complainants because it has declined to recognize its obligation to do so; but if this court should decide that the obligation exists, it must be presumed, until the contrary appears, that no dispute will arise as to the number of cars required, since it does not appear that as to cars which the Railroad recognizes its obligation to furnish any such dispute has ever arisen. The object of the proceeding in which the order was made was to establish the duty of the Railroad to provide tank cars, and the only issue here is whether or not the Commission had jurisdiction to make that order. If a controversy should hereafter arise as to the *number* of cars required for the normal shipments of complainants that proposition can then be considered.

V.

A railroad may be required to furnish cars for shipments to points on other lines of railroad.

The order makes no distinction between requests for cars to carry shipments consigned to points on the line of the Pennsylvania Railroad and requests for cars to carry shipments consigned to points on other lines of railroad, and this it is claimed renders the order void. Section 1 of the act, however, requires carriers to establish through routes and to provide reasonable facilities for operating such through routes. The order must be interpreted in the light of what the Commission has said as to the obligation of carriers under this provision. Record, page 32:

> The responsibility to the shipper of furnishing a proper supply of cars rests upon the road upon which the shipper is located and the traffic originates. *Campbell's Creek Coal Co.* v. *A. A. R. R. Co.*, 33 I. C. C., 558, 562; *Coal Rates on the Stony Fork Branch*, 26 I. C. C., 168, 174. The originating line as between it and its connections does not necessarily rest under the burden of supplying all the cars which may be required for transportation over through routes and under joint rates, but in the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carriers therein. *Huerfano Coal Co.* v. *C. & S. E. R. R.*, 28 I. C. C., 502, 506; *Lumber Rates*

through Ohio River Crossings, 29 I. C. C., 38, 39; *Pittsburgh & S. W. Coal Co.* v. *W. P. T. Ry. Co.*, 31 I. C. C., 660, 663.

The mere fact that the Railroad may be compelled under the order to permit its cars to leave its line does not invalidate the order. *Mich. Cent. R. R.* v. *Michigan R. R. Comm.*, 236 U. S., 615.

VI.

The order does not require the Railroad to seize all tank cars on its lines regardless of ownership or right of control.

The charge made in paragraph 14 of the petition that the Railroad is required by the order to furnish to complainants upon request all cars which happen to be on its line regardless of ownership is hardly to be taken seriously. The requirement of the act that the company must "provide and furnish" cars upon reasonable request cannot be distorted into a command to *seize* cars on its line regardless of ownership. The Commission states in its report, which is made a part of the order, that the Railroad may lease tank cars from the independent car lines, and there is no allegation in the petition that the independent car lines have refused to lease such cars to the Railroad. The order can be complied with in a lawful way and cars for shippers can be provided and furnished without resorting to illegal methods.

VII.

The order is not void by reason of the fact that it does not give a longer time for compliance.

After the petition was filed, the effective date of the order was extended to November 15, 1915, and there was no allegation that the additional time given for compliance was not sufficient. The Railroad, however, does not state how much time would be required for compliance, or that it has made any effort to comply. Until the Railroad has made an effort to comply, or at least shown to the Commission the time which would reasonably be required for compliance, and has been denied further time by the Commission, it is not in a position to ask that the order be declared void because more time was not given.

CONCLUSION.

The purpose of the act is plain. The wisdom of its policy was for Congress to determine and can be questioned neither by the Commission nor by the courts. It is inconceivable that Congress should have intended that the refusal of a carrier to furnish cars upon a reasonable request therefor, as provided in the act, should be justified by the mere failure of the carrier to *provide* such cars as may have been found by experience to be reasonably necessary for the transportation of the normal traffic of which it holds itself out as a common carrier. Clearly, moreover, Congress must have intended that the Commis-

sion charged with the duty of executing all the provisions of the act should have the power to determine the administrative questions here involved. We therefore ask that the judgment appealed from be reversed.

Respectfully submitted.

JOSEPH W. FOLK,

Counsel for the Interstate Commerce Commission.

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In the Supreme Court of the United States

October Term, 1916.

No. 341

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, and THE CREW-LEVICK COMPANY,
Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee.

BRIEF FOR THE CREW-LEVICK COMPANY.

On Appeal from the District Court of the United States for the Western District of Pennsylvania.

CHARLES D. CHAMBERLIN and
DAVID WALLERSTEIN,
Counsel for The Crew-Levick Company.

In the Supreme Court of the United States

October Term, 1915.

No. 791.

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, and THE CREW-LEVICK COMPANY,

Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Appellee.

BRIEF FOR THE CREW-LEVICK COMPANY.

On Appeal from the District Court of the United States for the Western District of Pennsylvania.

CHARLES D. CHAMBERLIN and
DAVID WALLERSTEIN,
Counsel for The Crew-Levick Company.

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Cases and Texts Cited.

In the Supreme Court of the United States

October Term, 1915.

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STATEMENT.

The Pennsylvania Paraffine Works, of Titusville, Pa., a corporation to which The Crew-Levick Company, appellant herein, is successor, on or about February 20th, 1913, filed a complaint before the Interstate Commerce Commission, against The Pennsylvania Railroad Company, alleging that it was, and for a number of years had been, engaged in the refining of petroleum, and shipped from its refinery at Titusville, Pa., about 450,000 gallons of said product per month to various points in interstate commerce; that The Pennsylvania Railroad Company was a common carrier subject to

the Act to Regulate Commerce (Rec., p. 7); that The Pennsylvania Paraffine Works had ample sidings and switches connected with the tracks of the Pennsylvania Railroad to receive, and facilities for loading and unloading, tank cars of petroleum and its products, and sufficient tanks in which to store such oils; that the lines of The Pennsylvania Railroad Company were best situated to receive and transport to destination The Pennsylvania Paraffine Works' shipments of oil; that The Pennsylvania Paraffine Works owned 50 tank cars, and requested and served notice in writing upon the officers of The Pennsylvania Railroad Company to furnish enough more tank cars to enable it to ship 450,000 gallons of oil and gasoline per month, on November 11th, 1912 (Rec., pp. 8-9); that The Pennsylvania Railroad Company, by its General Manager, replied, "We beg to say that the Railroad Company is not prepared to increase its tank car equipment, but is prepared to transport the commodities in question when properly contained in barrels, or other similar containers, at rates that are fair and reasonable and non-discriminatory."

Said complaint further alleged that The Pennsylvania Railroad Company had held itself out as willing to transport petroleum oils in bulk, and had so transported them for over twenty-five years; that the cost of transporting oils in barrels and similar containers was 25% more than in bulk, by reason of the weight of the container, and the cost of the package added 25% to the cost of the contents (Rec., p. 10); that The Pennsylvania Railroad owned about 500 tank cars, which were wholly inadequate to transport the oil in bulk offered to it for transportation, so that shippers of petroleum and its products were obliged to own and furnish tank cars which were necessary for the transportation in bulk, and that transportation in barrels would greatly increase the cost of such products to the public; that it was the duty

of The Pennsylvania Railroad Company to furnish such tank cars, and that The Pennsylvania Paraffine Works required upwards of 100 tank cars per month to transport its oils (Rec., p. 11); that The Pennsylvania Railroad Company, although often requested to furnish such tank cars, had neglected and refused to do so (Rec., p. 12).

The prayer of the complaint asked that The Pennsylvania Railroad Company be required to furnish the necessary tank cars, in conformity with the provisions of the Act to Regulate Commerce. (Rec., p. 14.)

The answer of The Pennsylvania Railroad Company admitted all of the averments of the complaint, except that it denied that it wholly failed, neglected and refused to furnish cars to complainant to ship its products in bulk, and denied that it had violated any of its obligations or the provisions of the Act to Regulate Commerce. The Pennsylvania Railroad Company refers to its publication in the Official Classification, in part, as follows: "In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are covered by this classification do not assume any obligation to furnish tank cars." (Rec., p. 17.)

The Interstate Commerce Commission, after hearing evidence on the matter offered by complainant and defendant, and briefs and arguments by counsel, on May 11th, 1915, made its report and order. (Rec., pp. 18-35.) The order entered is as follows:

> "It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the Act to Regulate Commerce and amendments thereto.

"It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect."

On June 3rd, 1915, The Pennsylvania Railroad Company filed a petition in the District Court of the United States for the Western District of Pennsylvania, against the United States, in which, aside from formal allegations, after reciting the order entered by the Interstate Commerce Commission, it averred that neither the Act to Regulate Commerce, or any other law, imposes on complainant the obligation to supply tank cars for the transportation of petroleum, and that the order entered by the Interstate Commerce Commission in the aforesaid proceedings is without lawful warrant; that neither the Act to Regulate Commerce, nor any other law, confers upon the Interstate Commerce Commission the authority to make the order aforesaid; that neither the Act to Regulate Commerce, nor any other law authorized the Interstate Commerce Commission in a proceeding of the character heretofore referred to in the petition as pending before it between The Pennsylvania Paraffine Works and the Pennsylvania Railroad Company to make the order referred to; that the order of the Interstate Commerce Commission entered in the proceedings heretofore referred to assumes to require the Pennsylvania Railroad Company to furnish to the Pennsylvania Paraffine Works tank cars for the through transportation of shipments of petroleum in interstate commerce, not only when consigned to points on the line of railroad of this company, but also when consigned to points on the lines of rail-

road of other railroad companies, and that the said order in this regard is without lawful warrant and contrary to the Fifth Amendment of the Constitution of the United States.

That the order aforesaid assumes to require the Pennsylvania Railroad Company to furnish The Pennsylvania Paraffine Works tank cars for the through transportation of petroleum in interstate commerce when such cars happen to be on the railroad of complainant whether or not such tank cars are owned by complainant or by other railroad companies or by private individuals and that the said order is in this regard without lawful warrant and is contrary to the provisions of the Act to Regulate Commerce; and that obedience thereto would subject complainant to actions for damages on the part of the owners of such tank cars and to liability in such actions and that the order is unlawful and contrary to the provisions of the Fifth Amendment to the Constitution of the United States; that the said order deprives complainant of its property without due process of law in this, that the time allowed for compliance with the order is insufficient to enable complainant to build tank cars and to permit it to arrange to acquire such cars or to obtain the use of them from present owners on reasonable terms, since such owners are under no compulsion to sell or rent them to this complainant upon just or reasonable terms; that the order in this regard is without lawful warrant and in violation of the Fifth Amendment of the Constitution of the United States; that the order aforesaid is uncertain and indefinite and without warrant in law.

That the order aforesaid will, unless enjoined, set aside, annulled and suspended, subject complainant to a multiplicity of suits for the enforcement of the said order under the provisions of the said act and will produce irreparable damage to complainant; that if complainant

should be compelled to comply with said order even temporarily pending final adjudication, complainant would be without means of reparation for the loss it would unlawfully sustain.

The Pennsylvania Railroad Company asks that a preliminary order or injunction be entered restraining and suspending the order of the Interstate Commerce Commission until final determination and that upon final hearing a decree be entered enjoining, setting aside, annulling and suspending the said order of the Interstate Commerce Commission and enjoining the enforcement of the said order. (Rec., pp. 2 to 6.)

A copy of said petition was duly served upon the Attorney General, whereupon on August 2nd, 1915, Defendant, The United States, filed a motion in the District Court below, to dismiss the petition for the reasons stated therein. (Rec., p. 37.) On September 16th, 1915, the Interstate Commerce Commission entered its appearance and The Crew-Levick Company filed its petition to be allowed to intervene, which was granted, and an order entered making The Crew-Levick Company a party defendant, whereupon it filed an answer. (Rec., p. 38.) The answer filed by The Crew-Levick Company is in substantial accord with the motion of the United States to dismiss the petition.

The cause was submitted before the Honorable Whooley, Circuit Judge, and Orr and Thompson, District Judges, an opinion filed November 9th, 1915, the first two judges concurring, the latter filing a dissenting opinion (Rec., pp. 46 to 58), and on November 13th, 1915, an interlocutory decree was entered overruling the motion to dismiss the petition and enjoining, anulling and suspending the order of the Interstate Commerce Commission. (Rec., p. 58.) On December 7th, 1915, Defendant, The United States, and intervening defendants, The Inter-

state Commerce Commission and Crew-Levick Company, joined in a petition for appeal with the following assignment of errors:

"The District Court erred:

I.

In overruling the motion of the United States to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

II.

In overruling the motion of the Interstate Commerce Commission to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

III.

In granting the interlocutory injunction enjoining the order of the Interstate Commerce Commission entered May 11, 1915, on complaint of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574, and the Crew-Levick Company v. Pennsylvania Railroad Company, No. 5574 (Sub. No. 1), and suspending the force and effect of the same, for that the petition of the complainant (a) does not set forth any cause of action and is insufficient to warrant the granting of the interlocutory injunction or to form the basis for any relief from the said order; (b) nor has the complainant shown that there is any equity in the said petition on which to grant the interlocutory injunction or to form the basis for any relief from the said order; (c) nor has the complainant shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred on it by the act to regulate commerce; (d) nor has the complainant shown that in making its said order the Interstate Commerce Commission violated any right of the said complainant protected by the Constitution of the United States or any other right of the said complainant over which this court may exercise jurisdiction.

IV.

In holding and adjudging that the Interstate Commerce Commission was and is without power and authority to enter the order in the case of Pennsylvania Paraffine Works v. Pennsylvania Railroad Co., No. 5574, and the Crew-Levick Co. v. Pennsylvania Railroad Co., No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington on the 11th day of May, A. D. 1915.

V.

In entering the following decree:

'That the application of the complainant for an interlocutory injunction be, and the same is hereby, granted, as prayed in the petition, and that an interlocutory injunction be, and the same is hereby, issued out of this court, enjoining, annulling and suspending the order of the Interstate Commerce Commission in the case of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574, and the Crew-Levick Company v. Pennsylvania Railroad Company, No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington, D. C., on the 11th day of May, A. D. 1915, and that the said defendants and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be enjoined and restrained from enforcing, or in any manner attempting to enforce or carry out, the said order or the terms thereof until the further order of the court.'

VI.

In finding and deciding as follows:

'We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power.'

VII.

In finding and deciding as follows:

'The carrier's duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them "according to their respective powers."

'Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them then to acquire them whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of the opinion that the amendment of 1906, including cars within the definition of "transportation", added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission and vested in the Commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law." '

VIII.

In finding and deciding as follows:

'We find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power, and that the order should be suspended and annulled in accordance with the prayer of the petition.'

IX.

In finding and deciding that:

'In none of them (cases subsequently cited in the opinion) was the question raised or decided nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation of a type it did not possess, or to acquire such transportation in order to provide and furnish the same upon reasonable request.'

X.

In not finding and deciding that it is plainly the duty of the carrier not only to furnish cars on reasonable request, but to furnish cars reasonably suitable for the proper transportation of the freight to be shipped.

XI.

In not denying the application for interlocutory injunction and dismissing the petition.

Wherefore, defendants, and each of them, pray that the said interlocutory order or decree of the district court, entered November 13, 1915, be reversed, annulled and set aside, with direction that the petition be dismissed, and for such other and further order as may be appropriate."

An order was entered allowing the appeal to the Supreme Court of the United States from the interlocutory decree, and thereupon the entire record was submitted.

POINTS IN ARGUMENT.

1. The petition of complainant below was without equity on its face.

2. The Interstate Commerce Commission did not transcend its power in making the order enjoined.

3. The order enjoined was made in a proper proceeding and supported by substantial evidence.

4. The Interstate Commerce Commission was the sole judge of the weight of evidence and the wisdom of the order.

5. The court cannot substitute its own judgment for that of the Interstate Commerce Commission.

6. The act to regulate commerce imposes upon the carrier the duty to provide and furnish a type of car suitable for the transportation in which it is engaged upon reasonable request.

7. The amended act to regulate commerce imposes the duty upon carriers and confers the power upon the Interstate Commerce Commission claimed by the government in this proceeding.

8. The common law imposes the duty upon carriers to furnish cars suitable for the transportation in which they are engaged.

POINT I.

THE PETITION OF COMPLAINANT BELOW WAS WITHOUT EQUITY ON ITS FACE.

(a) Complainant had not, as appears upon the record and upon the face of the petition itself, exhausted its remedies at law.

Section 267 of the Judicial Code is an elementary provision.

> "Suits in equity shall not be sustained in any court of the United States in any case, when a plain, adequate and complete remedy may be had at law."

Section 16-a of the act to regulate commerce (amendment of 1906) provides the opportunity for a rehearing by any party to a proceeding before it, and "if in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, may reverse, change or modify the same accordingly."

L. & N. R. R. Co. vs. U. S., 218 Fed., 89.
Atlantic Coast Line Railroad Co. vs. Macon Gro. Co., 166 Fed., 206.

No request of record is shown to have been made by complainant below of the Interstate Commerce Commission under Section 16 to extend the effective date of or to modify its order.

(b) The presumption that the order of the Interstate Commerce Commission was valid and regular was not overcome by any allegations in the petition.

Smith vs. St. L. & S. W. R. Co., 181 U. S., 248, 21 Sup. Ct. R. 603, 45 L. Ed., 847.
Railroad Com. vs. Cumberland Telephone & Tel. Co., 212 U. S., 414, 29 Sup. Ct. R. 357, 53 L. Ed., 577.

In the first of the above cases the court say:

> "But the presumptions of the law are proof, and such presumptions exist in the pending case, arising from the provisions of and the duties enjoined by the statute, and sanction the action of the sanitary commission and the governor of the state. If they could have been, they should have been met and overcome."

In the second case the railroad commission of Louisiana had reduced appellee's rates, and asked and had been granted a rehearing but no further evidence had been offered by the respondent before the commission, which thereupon affirmed its former order. An injunction against the order had been allowed by the United States Circuit Court for the Eastern District of Louisiana and appeal taken to the Supreme Court of the United States, which said:

> "The presumption in favor of the correctness of telephone rates established by a state commission obtains, although the data upon which the commission acted may have been insufficient, so long as the rates adopted were not based entirely upon arbitrary conjecture."
>
> "A bill seeking to enjoin, as confiscatory and unreasonable, the enforcement of telephone rates established by a state commission, will not be dismissed, even without prejudice, on reversing the decree below, granting an injunction, because of complainant's failure to show the disposition of its so-called depreciation fund, but the cause will be remanded for a new trial, where the inquiry has been founded upon the actual effect of rates higher than those in question, and hence it is not merely conjecture as to what will be the result of lower rates."

Nothing specific was shown in the petition of complainant below and the opinion of counsel was not enough to overthrow the presumption that the order was valid. The petition admitted in terms by the exhibits attached and made a part of it that it owned and furnished tank cars and published rates for the transportation of oil in

bulk, which was the usual way the greater part of such commodities were transported, which transportation, instrumentalities, facilities and practices the Act to Regulate Commerce gave the Interstate Commerce Commission authority to regulate, and imposed the duty upon the carrier to provide and furnish (Act to Regulate Commerce, Sec. 1, par. 2; Sec. 3, par. 2); that such tank cars so furnished were to be used for shipments to points on other lines than those of complainant company was not different than its present practice and in obedience to the Act to Regulate Commerce (Act to Regulate Commerce, Secs. 1 and 7).

The petition showed upon its face that the order did not require the complainant below to confiscate to its own use in order to furnish tank cars to the Pennsylvania Paraffine Works cars belonging to others so that it would thereby be subjected to a multiplicity of suits and suffer great and irreparable damage, nor have its property taken without due process of law, or without just compensation. Complainant below was not, by the terms of the order complained of and recited in its petition, required to build tank cars to comply with said order although the Interstate Commerce Commission had that power under the Act to Regulate Commerce. Therefore, the order was not, in that respect, unlawful nor did it deprive complainant of its property without due process of law, nor was the time allowed insufficient in which to build or acquire said tank cars to comply with said order, nor does it appear upon said petition that any request had been made by complainant of the Interstate Commerce Commission for a suspension of the effective date of said order as provided in Section 16 of said Act to Regulate Commerce.

The answer of the Interstate Commerce Commission and the Crew-Levick Company, intervening defendants, showed, however, that the effective date of said

order had, by order of the Interstate Commerce Commission, been extended to November 15, 1915. There is nothing indefinite or uncertain in the order as appears upon its face. There is nothing required of complainant below by said order of the Interstate Commerce Commission that will produce any damage to said complainant and no specification appears on the face of said petition wherein such alleged damage or loss might arise. As nothing appears upon the face of the petition to overthrow the presumption that the said order was valid and regular, said petition was without equity and should have been dismissed. Proctor & Gamble Co. vs. United States, et al., 225 U. S., 282, 56 L. Ed. 1091.

Baltimore & Ohio R. R. Co. vs. Pitcairn Coal Co., 215 U. S., 481, 54 L. Ed. 292, 30 Sup. Ct., 164.

Pennsylvania Co. vs. United States, 236 U. S., 351, 59 L. Ed., 616.

Interstate Commerce Commission vs. Union Pacific Ry. Co., 222 U. S., 541, 56 L. Ed., 308, 32 Sup. Ct., 108.

POINT 2.

THE INTERSTATE COMMERCE COMMISSION DID NOT TRANSCEND ITS POWER IN MAKING THE ORDER ENJOINED.

Section 15 of the Act to Regulate Commerce provides:

> "That whenever, after full hearing upon a complaint made as provided in Section 13 of this Act * * * the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier * * * as defined in the 1st section of this Act, or that any individual or joint classifications, regulations or **practices whatsoever** of such carrier or carriers, subject to the provisions of this Act are * * * unduly preferential or **prejudicial** or otherwise in violation of any of the provisions of this Act the Commission is hereby authorized and empowered to determine and prescribe what * * * **regulation** or **practice** is just, fair and reasonable, to be thereafter followed, etc."
>
> Section 12. "* * * and the Commission is hereby authorized and required to execute and enforce the provisions of this Act * * *."

This Court in Texas & Pacific Railroad Co. vs. I. C. C., 162 U. S., 197, 40 L. Ed. 940, said:

> "The significance of this language (the latter part of Section 1 of the Act) in thus extending the judgment of the tribunal established to enforce the provisions of the Act to the entire service to be performed by carriers is obvious."

Cin. Hamilton & Dayton Ry. Co. vs. I. C. C., 206 U. S., 142, 51 L. Ed. 995, 27 Sup. Ct. 648.

Penn Refg. Co. vs. W. N. Y. & P. R. Co., 208 U. S., 208, 52 L. Ed. 456, 28 Sup. Ct., 268.

Interstate Commerce Commission vs. Stickney, 215 U. S., 98, 54 L. Ed. 112, 30 Sup. Ct., 66.

Union Pac. Ry. Co. vs. Updike Grain Co., 222 U. S., 215, 56 L. Ed. 171, 32 Sup. Ct., 39.

Sou. Pac. Term. Co. vs. I. C. C., 219 U. S., 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

Interstate Commerce Commission vs. Ill. Cent. R. Co., 215 U. S., 452, 54 L. Ed. 280, 30 Sup. Ct., 155.

B. & O. R. Co. vs. Pitcairn Coal Co., 215 U. S., 481, 54 L. Ed., 292, 30 Sup. Ct., 292.

Robinson vs. B. & O. R. Co., 222 U. S., 506, 56 L. Ed. 288, 32 Sup. Ct., 114.

Morrisdale Coal Co. vs. P. R. Co., 230 U. S., 304, 57 L. Ed. 1494, 33 Sup. Ct., 938.

Mitchell Coal Co. vs. P. R. Co., 230 U. S., 247, 57 L. Ed., 1472, 33 Sup. Ct., 916.

Interstate Commerce Commission vs. B. & O. R. Co., 225 U. S., 326, 56 L. Ed., 1107, 32 Sup. Ct., 742.

N. Y., N. H. & H. R. Co. vs. Interstate Commerce Commission, 200 U. S., 361, 50 L. Ed., 515, 26 Sup. Ct., 272.

Montgomery vs. C. B. & Q. R. R. Co., 228 Fed., 616, 619, 621.

POINT 3.

THE ORDER ENJOINED WAS MADE IN A PROPER PROCEEDING AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

The proceedings herein were begun by the filing of a formal complaint before the Interstate Commerce Commission under Section 13 of the Act to Regulate Commerce (Rec., pp. 7 to 14), and as required by the Act, the defendant therein, not having satisfied the complaint filed its answer (Rec., pp. 15 to 17) *ad seriatim* to the allegations contained in said complaint but did not in its said answer allege or point out any irregularity in form, substance or procedure as none existed. In its petition in the court below, plaintiff therein adds nothing to its prior position except that it is advised by counsel and therefore avers, that neither the Act to Regulate Commerce nor any other law authorized the Interstate Commerce Commission in a proceeding, of this character to make the order referred to in its petition. (Rec., p. 4.)

The Interstate Commerce Commission held a hearing as provided by Section 13 of the Act at which both parties, without any objections on the part of defendant therein, offered testimony (Rec., p. 3), and thereafter both parties before the Commission filed briefs and argued the cause and regularly submitted it to the Commission for decision. The Interstate Commerce Commission, after full investigation as required by Section 14 of the Act, made a report in writing in respect thereto, stating its conclusions, together with its decision and order, (Rec., pp. 18 to 36), and as authorized by Section 15 of the Act, found what regulation or practice was just, fair and reasonable to be thereafter followed, and made an order that the defendant carrier should cease and desist

from such violation to the extent which the Commission found the same to exist and to conform to and observe the regulation or practice so prescribed. The entire proceeding was in full compliance with the Act to Regulate Commerce, the whole scope of which has been repeatedly held by this Court to be administrative and that the Interstate Commerce Commission and not the courts should pass upon administrative questions.

T. & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 51 L. Ed. 553, 27 Sup. Ct., 350.
B. & O. R. Co. vs. Pitcairn Coal Co., 215 U. S., 481, 54 L. Ed. 292, 30 Sup. Ct., 292.
Robinson vs. B. & O. R. R. Co., 222 U. S., 506, 56 L. Ed., 288, 32 Sup. Ct., 114.
United States vs. Pac. & Arc. Co., 228 U. S., 87, 57 L. Ed., 742, 33 Sup. Ct., 443.
Penna. R. Co. vs. International Milling Co., 230 U. S., 184, 57 L .Ed., 1446, 33 Sup. Ct., 893.
Mitchell Coal & Coke Co. vs. P. R. R. Co., 230 U. S., 247, 57 L. Ed., 1472, 33 Sup. Ct., 916.
Morrisdale Coal Co. vs. P. R. R. Co., 230 U. S., 304, 57 L. Ed., 1494, 33 Sup. Ct., 938.
Sou. Ry. Co. vs. Reid, 222 U. S., 424, 56 L. Ed., 257, 32 Sup. Ct., 140.
Vulcan Coal & Mining Co. vs. Ill. Cent. R. Co., 33 I. C. C., 52.
United States vs. Louisville & N. R. Co., 195 Fed., 88.

Plaintiff in the court below made no claim that the order was not made upon substantial and competent evidence.

POINT 4.

THE INTERSTATE COMMERCE COMMISSION WAS THE SOLE JUDGE OF THE WEIGHT OF EVIDENCE AND THE WISDOM OF THE ORDER.

From the evidence in the record before it, the Interstate Commerce Commission found that complainants in the proceeding were engaged at Titusville and Warren, Pennsylvania, in refining crude petroleum and had been for over twenty years; found the amount so refined by them, of which amount 91 percent was and had been shipped in tank cars; approximately 250 million barrels of crude oil was produced in the United States in 1914, 91 percent of the refined oil from that amount of crude was shipped in tank cars; complainants and dealers to whom they shipped had ample facilitites for loading and unloading tank cars; the only other method of shipping oil was in barrels or similar containers at an added cost of 3½ cents per gallon for the container and extra labor and 25% added cost of freight transportation which was prohibitive. Even witnesses for defendant admitted that tank cars are an absolute necessity for the transportation of refined products and that their use effected an economic gain; that revenue from their use compared favorably with revenue derived from movements in other cars and the transportation of oil in tank cars was desirable from a purely transportation standpoint.

The Pennsylvania Railroad Company, in 1887, acquired over 1300 tank cars and still owns 499,482 of which were furnished by it to shippers upon its line. The total number of tank cars in the United States was approximately 40,000. The complainants before the Interstate Commerce Commission owned a few tank cars, but not enough to meet their demands and request was made by them of the Pennsylvania Railroad Company to furnish a sufficient number to transport their requirements. The

request was refused. The Commission from the facts found it must decide not whether the tank cars supplied by defendant, together with those of complainants are sufficient to meet complainants' demands, but whether complainants may retire from the business of furnishing tank cars for the transportation of oil and thenceforth rely entirely upon railroads to provide this equipment. The question of the jurisdiction of the Interstate Commerce Commission over the controversy is then disposed of by referring to the provisions of the Act as amended, as interpreted by decisions of the courts and its own construction of the Act.

The Interstate Commerce Commission then turns to the contention of defendants that even if the Act should be held to invest the Commission with power to require carriers to purchase additional tank cars, the evidence in the case does not justify the Commission in exercising the power for the alleged reason that the circumstances attending the transportation of commodities in tank cars are so peculiar as to constitute them a class of equipment which should be furnished by shippers; that while the volume of petroleum shipments is greater than the volume of all other liquid commodities transported in tank cars, there are various other liquid commodities, some 44 enumerated some of which require tank cars of peculiar construction; the carrier would be under the necessity of acquainting its employees with all the possible difficulties and dangers of all liquid commodities transported. Even tank cars devoted to the petroleum trade must be divided into classes and their use restricted to refined, light and heavy lubricating oil classes. The demand for tank cars amounts in substance to a demand not only for the vehicle, but also for the package, and relieves the shippers of the expense of packing, which they may properly be called to bear.

Finally, that the Pennsylvania Railroad Company owns more tank cars than all other carriers east of the

Mississippi river and if other lines would furnish tank cars in equal proportions the supply would be sufficient to meet all demands; that complainants' requests would practically require the Pennsylvania Railroad Company to furnish equipment available for all railroads in such territory.

The Commission disposes of defendant's objections by concluding that for the shipment of some products it would not be reasonable to require carriers to furnish tank cars, but this would not be the case in the movement of petroleum. The record does not show that technical knowledge is needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish them. **The fact that defendant, for more than twenty years past, has been furnishing them bears witness to the contrary.** There is no hardship to defendant arising out of allowing its equipment to move beyond its lines; the necessity **for defendant to purchase** a large number of tank cars does not follow from the holding in this case. The requirement of the Act is to **provide** and **furnish,—not necessarily to buy,**—a reasonably adequate supply of cars, and the 13,000 or more tank cars owned by car line companies are available to defendant as well as shippers; moreover, all cars used by carriers whether they be owned by carriers themselves or leased from car line companies, or from shippers must be distributed without discrimination. This includes all cars secured from shippers for which carriers pay a compensation. At the same time, defendant will be under no obligation to accept for use any privately owned cars unless it chooses to do so. The responsibility to the shipper of furnishing a proper supply of cars rests upon the railroad upon which the shipper is located.

One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars

is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have not only shown that the volume of their past shipments is such as to justify the demands for equipment which they have made, but also that the future volume will be as great as in the past. (Rec., pp. 18 to 36.)

All of the above shows that the Interstate Commerce Commission, in this proceeding, carefully weighed the evidence both pro and con of which they were the sole judge and their findings of fact in this case is conclusive upon the courts. Their order based upon their findings and conclusions is reasonable and sound, the wisdom of which may not be questioned by the courts.

In Pennsylvania R. Co. vs. International Coal Mining Co., 230 U. S., 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, this Court said:

> "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

B. & O. R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164.

Robinson vs. B. & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114.

Morrisdale Coal Co. vs. Penna. R. Co., 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938.

Mitchell Coal Co. vs. Penna. R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.

POINT 5.

THE COURT CANNOT SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE INTERSTATE COMMERCE COMMISSION.

The majority opinion of the court below states the question to be decided in the following language:

> "The question in this case in the abstract is whether the act to regulate commerce, as amended, imposes upon a carrier the duty to acquire and to provide and furnish transportation of a type that, **physically** or **economically**, is best adapted to the needs and uses of the shipper, of which the Interstate Commerce Commission is the judge. The precise question is whether the Interstate Commerce Commission has power to compel the Pennsylvania Railroad Company to **purchase** and acquire tank cars for the shipment of oil, and to provide the same to complaining shippers upon requests which the commission may adjudge reasonable." (Rec., p. 49.) (Black faced type ours.)

A little farther on in the opinion it is stated:

> "Excerpts from several opinions of the Supreme Court were cited in support of the Government's contention that a railroad company, holding itself out as a carrier, is under a legal obligation, arising out of the fact of its employment, to provide transportation means and facilities commensurate with the demands of shippers, without regard to **whether they possess them or have the money with which to acquire them.**" (Rec., p. 49.)

Again:

> "* * * whether the power of the Interstate Commerce Commission to prevent undue preference and unjust discrimination in the use of a carrier's cars has been enlarged and expanded into a power to control the 'practices' of carriers, by determining and prescribing the type and character of 'all (their) instrumentalities and facilities of shipment or carriage,' in order to procure for the shipper a **better, safer,** and **more economic transportation service.**" (Rec., p. 50.)

Again:

> "Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a **certain type whether they had them or not,** and if they did not have them, then to acquire them, whether **they had the money or not.**" (Rec., p. 53.)

And finally:

> "The law clearly confers upon the commission power to so regulate the use of the facilities **possessed** by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to **acquire better facilities than those it possesses,** not with the object of preventing discrimination and preferences, **but in order that the shipper may have larger, better, and, perhaps, more economical facilities.** We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power and that the order should be suspended and annulled in accordance with the prayer of the petition." (Rec., p. 53.)

These are all conclusions of fact at variance with the conclusions of the Commission and furnish the basis for the judgment of the court below.

As opposed to the above conclusions, we excerpt pertinent findings from the opinion of the Commission found in the present record:

> "Defendant states that so long as there is no unreasonableness or discrimination in the rates and so long as the carrier's equipment is adapted to the safe transportation of the goods intrusted to it, there is nothing in section 1 which in any way restricts the right of the carrier to choose and select the vehicle of transportation which it regards most satisfactory for the conduct of its business.
>
> As bearing upon this point, it should first be stated that defendant **holds itself out to transport oil in bulk.** It not only publishes rates for the transportation of oil in tank cars, but owns tank cars and supplies shippers with them. It leases cars owned

by companies engaged in refining oil and transports their products in those cars at the rates it publishes for the movement by rail of oil in tank cars. It certainly cannot be contended that the transportation by rail of **oil in bulk could be attempted safely in any equipment other than tank cars.**" (Rec., pp. 26-27.)

Again:

"One further argument advanced by defendant should be considered in connection with the question of jurisdiction. Defendant states that to require the carrier to purchase additional equipment may involve a demand that the carrier increase its capital account, and the power of the commission can only properly be determined by a consideration of its right to require such action on the part of the railroads. But such an objection is not sound, because the question of the financial ability of any carrier would be a matter for consideration in **judging of the reasonableness** of the request for special or additional equipment and would be one of the matters considered by the Commission in **judging the particular case when the same arises.**" (Rec., p. 31.)

And,

"While it must be recognized that for the shipment of some of the products which now move to a certain extent in tank cars it would not be reasonable to require carriers to furnish tank cars, we do not believe this to be the case in the movement of the products of petroleum. In many industries a few tank cars will suffice to move the products of the industry. In other cases the tank cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of the men connected with that industry, or the handling of the commodity is a dangerous operation which can be safely performed only by men engaged in its production. In the latter case **a shipper's request for cars peculiarly suited for the transportation of his products would not be a reasonable one,** and in such cases carriers should publish rates for the transportation of the privately owned tank car filled with these products and not, as in the case of oil, for the transportation of the product in tank cars. The railroad

would not then hold itself out to transport the commodity in any other way than in tank cars offered by the shipper, and **no obligation would rest upon it to furnish these cars.** In such cases the shipper should receive no rental for the use of the car.

The record does not show such technical knowledge to be needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish cars. The fact that the defendant has for more than 20 years past been furnishing tank cars for the shipment of oil bears witness to the contrary. We see no particular hardship to defendant arising out of the necessity of allowing its equipment to move beyond its lines. Further, the necessity of defendant's **purchasing** a large number of additional tank cars **does not follow from our holding in the present case.** The requirement of the act is that defendant provide and furnish—not necessarily buy—a reasonably adequate supply of cars, and the 13,000 and more tank cars owned by independent car lines are available to defendant as well as to shippers. Defendant's brief contains the suggestion that perhaps the solution will be to have private companies furnish cars of special types. **That is a solution of which the carriers can avail** themselves if they so desire." (Rec., pp. 32-33.)

Also:

"Carriers should lease cars only upon such terms as permit them to meet their obligation to furnish cars without discrimination. Under this ruling cars of complainants and of all other refiners upon defendant's line offered it for use at a compensation will become available to defendant for distribution among all shippers who may apply for them. At the same time defendant will be under no obligation to accept for use any privately owned cars unless it chooses to do so. Atchison Ry. Co. v. U. S., 232 U. S., 199." (Rec., p. 33.)

Concluding as to the reasonableness of the demand:

"One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have

not only shown that the volume of their past shipments is such as to justify the demands for equipment which they have made but also have introduced evidence tending to show that in the future the volume of their business will be as great as in the past. Defendant will be required, upon reasonable request and reasonable notice, to furnish tank cars in sufficient number to move complainants' normal production. Defendant can not be required to furnish all the cars which may be demanded by complainants under extraordinary conditions arising from exceptional causes, which could not reasonably have been anticipated and which make it physically impossible to furnish all the cars desired." (Rec., pp. 34 and 35.)

If it were necessary to make this point clearer than by a comparison of the opinions quoted above, it would be made so by referring to the excellently reasoned and obviously sound dissenting opinion of Judge Thomson, who said:

"If, then, it is the duty of the carrier on reasonable request to furnish coal cars to the shipper of coal, stock cars to the shipper of live stock, fruit cars, with refrigeration, for the shipper of fruit, **on no principle could the oil shipper be denied cars reasonably suited for the shipment of oil.** The word 'reasonable', as used in the act, is a qualifying and saving term. Not merely the demands and needs of the shipper are to be considered but the circumstances of the carrier and the rights of the public as well. The fitness and efficiency of the transportation requested, whether the facilities of shipment would be made better and more economical, the public advantage to be derived therefrom, the cost and expense in relation to the benefit resulting, all the circumstances, time, and place, and means as affecting the carrier and its ability to supply the transportation demanded—these and all other relevant matters may be considered in determining the reasonableness of the shipper's demand. If the request be reasonable, it is the legal duty of the carrier to comply with it; if unreasonable, no such duty devolves upon the carrier. And **this question of fact,**

in case of dispute, the Commission must decide." Rec., p. 56.)

Also:

"We are not passing on some **abstract proposition** as to the power of the commission to order, without restraint, the equipment and furnishing of cars, without reference to conditions or circumstances. We are passing on a **concrete question based on specific facts, conclusively found by the commission.** It would be easy to imagine on the part of a shipper an unwarranted and unreasonable request and on the part of the carrier an arbitrary and unjust denial of a reasonable demand. The Interstate Commerce Commission is the tribunal standing between the parties, with power to hear and determine, and especially competent by reason of experience to determine with justness and uniformity of decision." (Rec., p. 57.)

Again:

"I cannot agree with the proposition that the duty imposed upon the carrier to furnish cars is limited to those which the carrier may have on hand, or that there is no obligation to acquire facilities it does not possess, or to acquire better facilities to meet the reasonable demands of the shippers. I base my conclusion on words of the act itself, 'it shall be the duty of every carrier subject to the provisions of this act, to provide and furnish such transportation on reasonable request therefor.' No words more specific or definite than 'provide and furnish' could have been chosen. I find no limitation of any kind in the act upon the duty thus imposed upon the carrier, except only that the request therefor be reasonable. There are no words from which it can fairly be assumed that existing ownership or control is a prerequisite to the carrier's duty to provide and furnish. From the explicit words of the act, it would seem to follow that if a reasonable request is made for cars and the carrier does not possess them, it must acquire them for use by one of the many methods for their acquisition. **If not, this most important provision of the statute would be rendered largely nugatory.** Perhaps the most effective blow which

Congress could deal at discrimination in interstate traffic is the duty imposed on the carrier to furnish transportation. There could be no more prolific source of discriminating practices than the right in the carrier to grant or withhold the means of transportation at its discretion. The demands of the favored shipper would be met by promptly acquiring and furnishing the transportation called for. We do not have what you demand, would be a conclusive answer to the less favored." (Rec., p. 57.)

C. H. & D. Ry. Co. vs. I. C. C., 206 U. S. 142, 51 L. Ed. 995, 29 Sup. Ct. 648.

POINT 6.

THE ACT TO REGULATE COMMERCE IMPOSES UPON THE CARRIER THE DUTY TO PROVIDE AND FURNISH A TYPE OF CAR SUITABLE FOR THE TRANSPORTATION IN WHICH IT IS ENGAGED UPON REASONABLE REQUEST.

Under this point it must be remembered that the record discloses the following facts; the total production of crude petroleum in the United States (1914) was upward of 250 million barrels; 91 per cent of the product was transported in tank cars; 40,000 tank cars were in use in the United States; 27,000 were privately owned; 13,000 were owned by car line companies, available for the use of carriers and shippers alike. The Pennsylvania Railroad Company owned 500 and had for more than 20 years furnished them for the transportation of petroleum; the revenue to carriers from the transportation of petroleum in tank cars compared favorably with other shipments in carloads; their use was advantageous from a transportation standpoint and was an economic gain to the public; they were the only means of transporting petroleum in bulk and admitted a necessity by defendants' witnesses before the Interstate Commerce Commission; carriers published rates, rules and regulations applicable to the transportation of petroleum in tank cars; they are instrumentalities of transportation; the complainants before the Commission had, upon reasonable notice, made a demand upon defendant to furnish them with a sufficient number of tank cars to transport their shipments; the Interstate Commerce Commission had found the above facts and made an order requiring defendant to cease and desist on or before August 15, 1915, and thereafter to abstain from refusing to provide and furnish tank cars to complainants for inter-

state shipments of petroleum and its products, which refusal had been found in its report to be in violation of the provisions of the Act to Regulate Commerce and amendments thereto, and to provide and furnish on or before August 15, 1915, and thereafter, upon reasonable request and reasonable notice at complainants' respective refineries, tank cars in sufficient number to transport complainants' normal shipments in interstate commerce. (Rec., 18 to 36.)

The Act to Regulate Commerce certainly, under these facts, imposes the duty upon the defendant to comply with this order.

In Chicago Board of Trade vs. Chicago & Alton Railroad Co., 4 I. C. C. R., 158, 187, the Interstate Commerce Commission, in discussing the question of the claimed right of carriers to work a discrimination in the use of equipment for the transportation of live hogs because of the difference between single-deck and double-deck cars, said:

> "Now it is one of the plain duties of the carrier to properly equip its road with all such cars as experience has shown to be necessary for the right movement of freight along its line, and in like manner to have depots and arrangements for the proper and necessary receipt and delivery of freight at stations along its line. A carrier is not warranted under the statute in setting up its own omission in these respects to justify an exceptional rate which unjustly discriminates against one locality in favor of all others and against one kind of traffic in favor of another."

In Covington Stock-Yards Co. vs. Keith, 139 U. S., 128, 133, 35 L. Ed., 73, 11 Sup. Ct., 461, the Supreme Court of the United States, speaking through Mr. Justice Harlan, said:

> "The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and fa-

> cilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public."

In Atchison Railway Co. vs. United States, 232 U. S., 199, 217, 58 L. Ed., 568, 34 Sup. Ct., 291, the Supreme Court of the United States, in sustaining the order of the Interstate Commerce Commission speaking through Mr. Justice Lamar, said:

> "Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers."

In Ellis vs. Interstate Commerce Commission, 237 U. S., 434, 59 L. Ed., 1036, decided May 10, 1915, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

> "The Armour Car Lines is a New Jersey corporation that owns, manufactures, and maintains refrigerator, **tank** and box cars, and that lets these cars to the railroad or to the shippers * * *. It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request * * *."

See also to the same effect United States vs. Union Stock Yards & Transit Co., 226 U. S., 286, 303, 57 L. Ed. 226, 33 Sup. Ct., 83; Pennsylvania Co. vs. United States, 236 U. S., 351, 362, 59 L. Ed., 616, and Loomis vs. Lehigh Valley R. Co., 240 U. S., 42.

POINT 7.

THE AMENDED ACT TO REGULATE COMMERCE IMPOSES THE DUTY UPON CARRIERS AND CONFERS THE POWER UPON THE INTERSTATE COMMERCE COMMISSION CLAIMED BY THE GOVERNMENT IN THIS PROCEEDING.

The claims of the government and other appellants before this Court are revealed in the record at page 37, the motion of the United States to dismiss and at pages 60, 61, 62 and 63, in the assignment of errors in the court below. These claims may be affirmatively stated as follows:

(a) The Act to Regulate Commerce, by legislative declaration, imposes upon every **carrier** under the Act engaged in transportation the duty to provide and furnish upon reasonable request such cars as are reasonably necessary for the **handling** of such traffic in interstate commerce of which it is a carrier.

This proposition can not be better supported than by the words in the dissenting opinion of Judge Thompson at pages 54 and 55 of the record:

> "In the original act of February 4, 1887, it is said: 'The term "transportation" shall include all instrumentalities of shipment or carriage.' These words are clearly comprehensive enough to include cars as an instrument of shipment. But we need not stop to conjecture as to their full breadth and meaning. It is sufficient that Congress thought proper to enlarge the scope of the term "transportation" by providing in the act of 1906 as follows:
>
> 'The term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer

in transit, ventilation, refrigeration, or icing, storage and handling of property transported, and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.'

"This, instead of being a concise and accurate definition of the term 'transportation,' is rather a legislative declaration of what the term shall include. Much broader than the words, 'all instrumentalities of shipment and carriage' in the original act, are the words of the amendment, 'cars and other vehicles and all instrumentalities and facilities of shipment and carriage.' The very comprehensive word *facilities* of shipment and carriage was a significant addition to the original act. These words are again made more comprehensive by the words which follow, 'irrespective of ownership or of any contract, express or implied, for the use thereof.' Whether held by the carrier by purchase, hire, exchange, lease, bailment, or any contract for their use, express or implied, they are to be regarded as the instruments of the carrier, and the shipper, as well as the commission, is thus relieved of the annoyance of dealing with more than one person. The scope of the term transportation is again enlarged by the use of the words, 'and all service in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.' Having thus defined transportation, it is then declared to be the duty of every carrier, subject to the provisions of the act, to provide and furnish such transportation upon reasonable request therefor."

C. R. I. & P. Ry. Co. vs. Hardwick Farmers Elevator Co., 226 U. S., 426, 57 L. Ed., 284, 33 Sup. Ct., 174.

Yazoo & M. V. R. R. Co. vs. Greenwood Gro. Co., 227 U. S., 1, 57 L. Ed., 389, 33 Sup. Ct., 213.

St. L. I. M. & S. Ry. Co. vs. Edwards, 227 U. S., 265, 57 L. Ed., 506, 33 Sup. Ct., 262.

Hampton vs. St. L. I. M. & S. Ry. Co., 227 U. S., 456, 57 L. Ed. 596, 33 Sup. Ct., 263.

(b) It is the duty imposed by the Act upon the Interstate Commerce Commission to enforce the duty upon the carrier to provide and furnish cars upon reasonable request.

Sections 12, 13, 14 and 15, in connection with Sections 1, 2, 3 and 7, cover the entire controversy.

Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 51 L. Ed., 553, 27 Sup. Ct., 350.
Baltimore & Ohio R. Co. vs. Pitcairn Coal Co., 215 U. S., 481, 54 L. Ed., 292, 30 Sup. Ct., 164.
Mitchell Coal & Coke Co. vs. P. R. R. Co., 230 U. S., 247, 257, 57 L. Ed., 1472, 33 Sup. Ct., 916.
Robinson vs. B. & O. R. R. Co., 222 U. S., 506, 56 L. Ed., 288, 32 Sup. Ct., 114.
United States vs. P. & A. Ry. & Nav. Co., 228 U. S., 87, 57 L. Ed., 742, 33 Sup. Ct., 443.
Morrisdale Coal Co. vs. P. R. R. Co., 230 U. S., 304, 57 L. Ed., 1494, 33 Sup. St., 938.
Pennsylvania R. R. Co. vs. Puritan Coal Min. Co., 237 U. S., 121, 59 L. Ed., 867, 35 Sup. Ct., 484.
Pennsylvania R. R. Co. vs. Clark Coal Min. Co., 238 U. S., 456, 59 L. Ed., 1406, 35 Sup. Ct., 896.

The words "cars" embraced in the amended Act, section 1, includes all kinds of cars and is used generically.

Johnson vs. S. Pac. Co., 196 U. S., 1; 49 L. Ed., 363, 25 Sup. Ct., 158.
Schlemmer vs. B. R. & P. Ry. Co., 205 U. S., 1; 51 L. Ed., 681, 27 Sup. Ct., 407.
N. & W. R. R. Co. vs. United States, 177 Fed., 623.
A. T. & S. F. Ry. Co. vs. United States, 232 U. S., 199; 58 L. Ed., 568.
Suttle vs. Choctaw, O. & G. R. R. Co., 144 Fed., 668.
C. M. & P. S. Ry. Co. vs. U. S., 196 Fed., 882.
Penn. Refg. Co. vs. W. N. Y. & P. R. R. Co., 208 U. S., 208; 52 L. Ed., 456, 28 Sup. Ct., 268.

(c) The order enjoined is by every test a lawful and valid order.

It is not objected that the order is not made regularly in proceedings according to the provisions of the

Act to Regulate Commerce or that the conclusions of the Commission were not supported by sufficient evidence, or that the order was so arbitrary as to transcend the powers of the Interstate Commerce Commission. The court below states the finding of the Commission to have been that the railroad company was guilty of an unjust and unreasonable practice in not possessing or in not acquiring and furnishing tank cars in sufficient number to meet the requirements of the complainant's business.

The court states the question:

> "The question in this case in the abstract is whether the Act to Regulate Commerce Commission, as amended, imposes upon a carrier the duty to acquire and to provide and furnish transportation of a type that, physically or economically, is best adapted to the needs and uses of the shipper, of which the Interstate Commerce Commission is the judge."
>
> "The question is whether the Interstate Commerce Commission has power to compel the Pennsylvania Railroad Co. to **purchase** and acquire tank cars for the shipment of oil, and to provide the same to complaining shippers upon requests which the Commission may judge reasonable."

We cannot suppress the mental inquiry as to whether this statement and restatement of the question is ingenuous or ingenious when remembering the facts found by the court upon which the question is stated.

> "The cost of carrying oil in barrels is 3½ cents per gallon above the cost of carrying it in tank cars * * * making shipment by this method expensive if not prohibitive."
>
> "Ninety-one percent is carried in tank cars * * *. The number of tank cars in the United States is 40,000 * * *. The Pennsylvania Railroad Company owns 499 * * *. The Pennsylvania Railroad Company publishes rates for the transportation of oil in tank cars and furnishes tank cars within the limit of its supply."

Do not these facts show the tank car, as witnesses for the Pennsylvania Railroad admitted, a necessity for

the transportation of oil? Is the question then fairly stated by using such words as "physically or economically best adapted to the needs of the shipper?" Again, reading the order of the Interstate Commerce Commission, is there in it the words "purchase and acquire tank cars?" Did not the order adopt the words of the statute instead "to provide and furnish such transportation?" Did the decree issue upon any such conclusion?

Had the word "tank" been omitted, would there have been any objection to the order? And yet the word is purely adjective and not substantive. Is not a tank car (there are 40000 of them in the United States) a car? Does not every other car have an appropriate description? The Act, in declaring what transportation is, does not leave the word "car" in a technical sense as its equivalent, but includes "other vehicles" which would include a tank car if it is not a "car," and still further, "all instrumentalities and facilities of shipment or carriage and all services in connection with the receipt, delivery * * *, and handling of property transported." How can carriers "receive, deliver or handle" oil in bulk without tank cars, or coal in bulk without coal cars, live stock in bulk without stock cars, perishable goods without refrigerator cars, or passengers without passenger cars? The practical necessity defines the kind of car, but in all cases, the demand for the specific car must be reasonable of which the Interstate Commerce Commission must judge.

Webster defines facility, "quality of being easily performed." In the transportation of oil, a tank car is eminently a facility.

State vs. Mo. Pac. R. Co., 29 Nebr., 550, 45 N. W. 785.

L. R. & F. S. Ry. Co. vs. Oppenheim, 64 Ark., 271, 43 S. W. 150, 44 L. R. A., 353.

The court below accepted the limitations to the powers of the Interstate Commerce Commission as found by

it in Scofield vs. L. S. & M. S. Ry. Co., 4 I. C. C. 158, 2 I. C. R. 67, at which time the Commission did not have the power to fix a rate or regulate a practice, and yet the court refused to find the necessary power to make the order suspended in this case.

To show graphically how great the change was, we quote the second paragraph of section 1 with the changes made by the amendments in bold face type.

> **"The term 'common carrier' as used in this Act shall include express companies and sleeping car companies.** The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, **and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property;** and the term 'transportation' shall include **cars and other vehicles and** all instrumentalities **and facilities** of shipment or carriage **irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipts, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."**

All that these important changes meant, say the court, were merely to give the Interstate Commerce Com-

mission control over certain services, "ventilation, refrigeration, icing, storage and handling of property," but no change as to "Transportation" except the added "services". No wonder Judge Thompson exclaims,

> "From the explicit words of the Act, it would seem to follow that if a reasonable request is made for cars, and the carrier does not possess them, it must acquire them for use by one of the many methods of acquisition. **If not, this most important provision of the statute would be rendered largely nugatory.**" (Bold face ours.)

POINT 8.

THE COMMON LAW IMPOSES THE DUTY UPON CARRIERS TO FURNISH CARS SUITABLE FOR THE TRANSPORTATION IN WHICH THEY ARE ENGAGED.

Judge Thompson in his dissenting opinion (p. 55, Rec.) is clearly right in saying:

> "Whatever may have been the duty resting upon a carrier at common law to furnish transportation of the shipper's property, it admits of no doubt that the furnishing of transportation, as defined by the act, has been made a clear statutory duty of the carrier."

It seems therefore almost unnecessary to discuss this point, especially in view of the language found in Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S., 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (January, 1896):

> "The significance of this language in thus extending the judgment of the tribunal established to enforce the provisions of the act to the entire service to be performed by carriers, is obvious."

However, as the principles of the common law are operative upon all interstate commercial transactions, except so far as modified by congressional enactments, it may be well to briefly notice what such common law duties comprise.

> Western Union Telegraph Co. vs. Call Publishing Co., 181 U. S., 92, 45 L. Ed. 765, 21 Sup. Ct. 561.

Whatever may be the duties and obligations imposed by the common law, they are not fixed and definite but expand with the art.

> "The common law of a country will never be entirely stationary, but will be modified and extended by analogy, construction and custom so as to em-

brace new relations." Moss Point Lumber Co. vs. Board of Supervisors of Harrison Co., 42 South. 290, 89 Miss., 448.

As said by the Supreme Court in re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900:

> "Constitutional provisions will not change, but their operation extends to new matters as the mode of business and habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal-boat and sailing vessel, yet in its actual operation it touches and regulates modes of transportation then unknown—the railroad trains and the steamships. Just so it is with the grant of power to the National Government over interstate commerce. The Constitution has not changed; the power is the same, but it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

And again, in Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S. Rep., 1, 24 L. Ed., 708:

> "They extend from the horse and wagon to the stage coach, from the sailing vessel to the steamboat, and from the coach and steamboat to the railroad, from the railroad to the telegraph, as these modes are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances."

The administration of the Act to Regulate Commerce by the Commission appointed for such purpose is necessarily in consonance with its provisions, and where they are silent upon any matter requiring their regulation, to preserve the purposes of the act reliance upon the principles of the common law is necessary. That this is true is aptly shown in many conclusions of the Commission. The application of such principles is illus-

trated in a dissenting opinion of Mr. Commissioner McChord in the case of Frankfeld & Co. vs. New York C. R. R. Co., 40 I. C. C., 555, and is applicable to the case at bar:

"The defendants not only hold themselves out to carry dressed meats generally, but specifically publish carload ratings on frozen and chilled Argentine meat westbound from shipside at New York. Holding themselves out as common carriers of dressed meat, the common law charges them with the duty of providing safe and suitable equipment in which to transport this commodity. (See Hutchison on Carriers, third edition, sec. 497. Railroad Co. v. Pratt, 22 Wall. 123, 133.) It is the contention of defendants that they are under no duty to furnish complainant with cars equipped as required, because they have no cars so equipped, and because under the common law as they construe it the duty to furnish cars is limited to the facilities owned by a carrier, and there is no obligation upon it to acquire other facilities which might be necessary for a particular kind of traffic. However, this is not a correct statement of the law. In Hutchinson on Carriers, supra, section 495, it is said:

" 'The first duty of the common carrier who holds himself out to the public as ready to engage in the carrying business is, of course, to provide himself with reasonable facilities and appliances for the transportation of such goods as he holds himself out as ready to undertake to carry.'

"This principle of the common law has never been changed or modified. In the marvelous development of commerce and industry, however, it has come about that common carriers in responding to commercial necessities, just as in the present case, now hold themselves out to transport commodities which previously no one thought could be transported as a practical matter and which may not be carried in the sort of equipment commonly employed. In such instances the same rule of law is applied, and common carriers have been held liable for failure to furnish refrigerator cars suitable for the protection of perishable freight received for transportation. See Hutchison on Carriers, supra, Sec. 505.

"It is further urged that if it be the duty under the common law to furnish suitable equipment, the obligation of the carrier to furnish special cars is dependent upon the amount of traffic offered by the shipper requesting such equipment. The majority report adopts this view. This contention, however, is clearly unsound, since under the common law rule here invoked the only question is whether the carrier holds himself out to carry the particular commodity. If it does, the duty attaches. The carrier may not hold itself out to carry freight and only accept that kind of freight if a large quantity is offered when in the offer to carry no limitation is made as to the amount that must be offered. The refusal to furnish cars in which to transport the dressed meat of complainants after publishing a carload rate for the transportation of dressed meat is tantamount to a refusal to accept complainants' shipments for carriage. There is no duty upon a shipper under the act or at common law to furnish the car in which his commodity must be shipped. The holding out of the defendants in their tariffs is not limited to the transportation of dressed meats loaded in cars belonging to shippers. For the defendants to publish rates applicable only to the movement in cars furnished by shippers would undoubtedly be unlawful discrimination under the principle in the Train Lot Rate Cases, Anaconda Copper Min. Co. v. C. & E. R. R. Co., 19 I. C. C. 592, 596; Wells Lumber Co. v. C. M. & St. P. R. R. Co., 38 I. C. C. 464, because only certain of the large shippers could avail themselves of the transportation and the ordinary shipper, who does not own cars, would not be able to compete with them. This discrimination, however, is accomplished as a result of the conclusion reached in the majority opinion. Although holding themselves out unqualifiedly in their tariffs as common carriers of dressed meat, the decision in this case in effect excuses these defendants from the discharge of their duty as common carriers to transport shipments of dressed meat offered by complainants. At the same time the rates are permitted to remain in effect, making it possible for the larger American meat packers, who own their own cars, to import

frozen and chilled meats from Argentina, and to secure markets for these meats at which complainants cannot compete. Thus the decision in this case permits indirectly a result which the parties themselves could not lawfully accomplish."

While the court below did not notice the particular objections of the complainant before it to the order enjoined as sustaining its opinion and decree, a point or two may be referred to in closing.

(a) Its objection to furnish cars to go beyond its lines in the through routes over which it publishes through rates in tank cars is met in Michigan Central Railroad Co. vs. Michigan Railroad Commission, 236 U. S., 615.

(b) The order does not require the Pennsylvania Railroad Company to seize all tank cars on its line, regardless of ownership or right of control.

Carriers should lease cars only upon such terms as to permit them to meet their obligations to furnish cars without discrimination.

"At a compensation" means "consideration in the lease."

If the word "compensation" includes or comprehends "allowance", then the language of the decision would seem to destroy the "shipper's car", for that language is to the effect that all cars offered the carrier "for use at a compensation will become available to defendant for distribution among all shippers." If "compensation" comprehends "allowance", then the shipper's car ceases to exist the instant it is tendered to the carrier, and such car becomes a carrier's car.

The words "lease" and "rental" have a well-recognized meaning in law. They have been in use for centuries. They applied originally to lands and not to personal property, and while not applied to the latter, the fundamental element of "time" entering into those

words has not been changed. In speaking of a "lease" or a "rental", aside from the consideration, the controlling element is "time". Time is the first thing thought of—the days, the months or the years covered by the lease or the rental. So when a corporation or an individual leases or rents cars to railroads, "time" is of the essence of the contract.

No one would argue that a car leased or rented under these circumstances did not become a public vehicle subject to the use of all shippers without discrimination. Under such circumstances the lessor makes a business of leasing or renting cars to railroads for profit, and it is difficult to even conceive why the lessor should desire to limit the use of such a car. The Commission has no authority in such a lease. The carrier may rent or lease its cars upon such terms as it deems advantageous to itself. It is no concern of the government what the terms of the contract are, as no public question is involved. This may be qualified only to the extent that if the owner of the car is also a shipper the lease of the car may not be used as a cloak for a rebate.

An "allowance" is made only to a shipper. The allowance to shippers rendering any service for funishing any instrumentality (a car, for instance) for such transportation is provided for by Congress in the fifteenth section of the act.

There is a clearly marked line of distinction between money paid in the form of an "allowance" to a shipper for either furnishing a transportation service or an instrumentality such as a car, and the "compensation" paid to one engaged in the business of leasing cars for profit. The same distinction appears in the "allowance" to a shipper out of the rate and the "division" paid to another common carrier out of the rate. An allowance can be made only where the shipper's freight is

involved. If the freight of others is handled, then he who handles it is either a common carrier as to that business or an agent of the principal carrier. In the case of the shipper's freight, the money paid is an allowance. When not his freight, the money paid is either a division of a rate or compensation to an agent. Under the fifteenth section, the Commission can fix the allowance to the shipper in every case. As to the division of the rate and compensation to the agent, the Commission has no authority, unless the shipper owns the railroad or the agent himself is the shipper.

While the very essence of a lease or rental is "time", that is not true of an "allowance". It applies to a transaction, to a trip, to a journey, and the "allowance" ceases when the trip ends.

> Railroad Commission of Ohio vs. Hocking Valley Ry. Co., 12 I. C. C., 398.
> United States vs. Pitcairn Coal Co., 154 Fed. Rep., 108.

That the order is void for lack of time in which to comply has been referred to heretofore. That the order is indefinite and uncertain is answered by the language of the act to regulate commerce which the Interstate Commerce Commission followed, and must be read in connection with the conclusions in the opinion.

CONCLUSION.

There is no question of irregularity of proceedings, no doubt of the correctness of the finding of facts, no objection to the sufficiency of evidence. The law is plain.

> "It is highly significant, therefore, that the more important duty to furnish transportation has no limitation or condition, except upon the reasonable request of the shipper. If the wisdom of the order in question, or its necessity, needed justifica-

tion, it appears in the conclusive findings of the commission that 91 per cent of the refined oil of the country is shipped in tank cars at a great economic gain."

Respectfully submitted,

CHARLES D. CHAMBERLIN,
DAVID WALLERSTEIN,
Counsel for The Crew-Levick Company.

Dated at Cleveland, Ohio, this 16th day of September, A. D. 1916.

IN THE

Supreme Court of the United States

THE OIL TANK CAR CASES.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION AND CREW-LEVICK COMPANY, Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY.

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In the Supreme Court of the United States.

THE OIL TANK CAR CASES.

OCTOBER TERM, 1916. NOS. 340 AND 341.

The United States and Interstate Commerce Commission, Appellants,

vs.

The Pennsylvania Railroad Company.

The United States, Interstate Commerce Commission and Crew-Levick Company, Appellants,

vs.

The Pennsylvania Railroad Company.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY.

STATEMENT OF THE CASE.

These appeals bring up for review the validity of orders entered by the Interstate Commerce Commission in two proceedings initiated before that tribunal by complaints filed, the one by the Pennsylvania Paraffine Works and the other by the Crew-Levick Company. Copies of these complaints are attached to the bills filed in these suits, designated "Exhibits A," their general purport requesting that the Interstate Commerce Commission order The Pennsylvania Railroad Company to furnish tank cars to the complainants as stated in the bills. (Record in No. 340, page 5; in No. 341, page 7.)

The Railroad Company filed answers to the complaints, and also motions to dismiss, for the reason, as alleged, that the Commission was without jurisdiction to entertain the complaints or to grant the relief prayed for (Record in No. 340, pages 13 and 16; in No. 341, pages 15 and 18). The Commission assumed jurisdiction, however, and hearings having been held, the proceedings in question eventuated in each instance in an order reading as follows:—

> "It is ordered, That The Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15th, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the Act to Regulate Commerce and amendments thereto.
>
> "It is further ordered, That said defendant be, and it is hereby notified and required to provide, on or before August 15th, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

> "And it is further ordered, That this order shall continue in force for a period or not less than two years from the date when it shall take effect." (Record in No. 340, page 34; in No. 341, page 35.)

The cases present, therefore, the question of the power of the Commission to require the furnishing of VEHICLES OF A SPECIAL TYPE having no reference to the safety of transportation, and *not*, as indicated by the Government (page 1 of its brief), the power of the Interstate Commerce Commission to require railroads to provide and furnish [generally], upon reasonable demand, an adequate number of cars for interstate transportation.

ARGUMENT.

The importance of the present cases has not been exaggerated by the Government. The orders entered by the Interstate Commerce Commission are calculated, if sustained, to accomplish a result which Congress has steadily refused to bring about by specific and direct legislation.

Thousands of cars moving over the rails of the carriers of this country are privately owned, a situation largely due, it is believed, to the early conception of a railroad company as a highway of transportation as well as a transporter of commodities. In fact, the specific obligation to receive vehicles privately owned and to move them over its rails has been incorporated in the charter of more than one railroad; and this is true of The Pennsylvania Railroad Company, the appellee in this proceeding.

The oil industry is a striking illustration of the extent to which private ownership of these vehicles of transportation has been carried. Thus the report of the Commission in the present proceedings states that of the tank cars owned by corporations and shippers east of the Mississippi River, 27,700 are privately owned (R. 21)* and only 802 are cars

*As in the Government's Brief (see page 6) references to the record, unless otherwise noted, will be to the record in No. 341.

of railroad ownership (R. 20-21). In fact, the companies, whose complaints initiated the present proceedings, have themselves invested in tank cars, and the Commission's report shows that at the time of the hearing the Pennsylvania Paraffine Works owned 54 and the Crew-Levick Company 57 tank cars (R. 21). Nor is there any suggestion in the record that these cars were not voluntarily purchased by the shippers.

As is pointed out in the brief filed on behalf of the Government, this situation was long ago brought to the attention of Congress, but, in spite of this, Congress has consistently declined to indicate by any specific or direct language an intention to require a change. In the face of this situation, however, the Commission has sought, by laying hold of general language, to justify the exertion of an extraordinary power and to bring about by indirection a result which Congress has refused—and it is submitted has intentionally refused—to accomplish by specific enactment.

The Pennsylvania Railroad Company respectfully submits that the orders entered by the Interstate Commerce Commission in the proceedings referred to were without legal warrant for the following reasons:—

I. The Act to Regulate Commerce does not impose on a railroad company the obligation to furnish tank cars or to increase the supply of tank cars which it may have available.

It is not pretended that the Commission had any power to make orders such as those here under discussion prior to the Hepburn Amendment of 1906 to the Act to Regulate Commerce. In fact the Commission itself had emphatically disclaimed any such power:

Scofield *vs.* Lake Shore & Michigan Southern Ry., 2 I. C. R. 67 (1887);

Rice *vs.* Cincinnati etc. Ry., 3 I. C. R. 841 (1892).

Accordingly it is necessary to consider only whether the amendment of 1906 has made any change in this regard, since neither the amendment of 1910 nor any other amendment contains any provision which would enlarge the obligations of the carrier or the power of the Commission with respect to this matter.

1. THE HISTORY AND PURPOSE OF THE AMENDMENT OF 1906. THIS AMENDMENT WAS NOT INTENDED TO ENLARGE THE COMMON LAW OBLIGATIONS OF THE CARRIER WITH RESPECT TO THE FURNISHING OF EQUIPMENT; AT THE MOST THE AMENDMENT MERELY TRANSMUTED THE OBLIGATION INTO A FEDERAL OBLIGATION.

The provision of the amendment of 1906 which is relied on by the Government and the Commission is that portion of Section 1 which reads as follows:—

> *"The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease,* and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; *and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery elevation and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable*

request therefor, and to establish through routes and just and reasonable rates applicable thereto."

This provision, in those features which are operative in the present case, and which have been italicized, follows, word for word the bill recommended by the Interstate Commerce Commission itself in its Report of 1905 (page 177). The provision as it there appears is as follows:—

> "The term railroad, as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term transportation shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor."

It will be seen that the insertions made by Congress in the provision recommended by the Commission do not affect the present controversy.

It thus appearing that the statutory mandate here invoked had its source in the recommendations of the Commission it is not only of interest, but of importance as indicating the true construction of the section in the light of the situation it was intended to meet, to refer to the explanation made by the Commission to Congress of the purpose intended to be accomplished by the enactment. This explanation is found on pages 6 and 7 of the Commission's Report of 1905 and is as follows:—

"ENLARGMENT OF JURISDICTION.

"It will be seen that the changes proposed in the first section are designed (*a*) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (*b*) to bring within the scope of the law certain charges and practices which are not now subject to regulation or respecting which there is dispute as to the power of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase 'under a common control, management, or arrangement,' in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the act. The second purpose is sought to be accomplished by enlarging the definition of the term 'transportation,' so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide *the services here referred to** is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the act, which are commonly spoken of as containing its principal or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction. *In this connection, and* AS ILLUSTRATIVE OF THE MATTERS HERE REFERRED TO, *the subject of refrigeration charges may be properly considered.**

"REFRIGERATION CHARGES.

"At the present time large quantities of perishable commodities are transported over such distances that artificial refrigeration is necessary. From comparatively small beginnings this traffic has grown to enormous proportions. In the transportation of these commodities the icing is just as essential as the hauling of the car. The owner of the commodity transported can no more provide the refrigeration than he can provide

* Italics ours.

the transportation itself. The consequences of exacting an exorbitant icing charge or of imposing upon one shipper a higher charge for refrigeration than is imposed upon his competitor are precisely as serious as the same kind of extortion or discrimination would be in the transportation charge itself. Every reason which requires that the freight rate should be published and maintained, subject to supervision and control by the Commission, applies to these charges for refrigeration.

"As the business is now conducted, some railroad companies furnish refrigeration themselves, but in most cases it it furnished by independent companies which usually provide the car, for which the railway pays, and the ice, for which a charge is made against the shipper. Formerly there were several of these companies, but today the business has fallen into the hands of two or three, of which the Armour Car Lines is the principal. Extended investigations by the Commission have led to the conclusion that the charges imposed are, in some cases at least, exorbitant, and that those charges are not uniformly exacted.

"The Commission has held that the furnishing of refrigeration is a part of the transportation itself, and that the railway is, under the present law, obliged to publish and maintain these charges for icing. The railways, however, confidently insist, first, that the providing of refrigeration is a local service, not a part of the transportation, which is not and cannot be put under the supervision of any Government tribunal; and, second, that even if the Congress might impose upon the carrier the duty of furnishing this service, it has not done so; that the service is furnished by private persons, and not, therefore, subject to the jurisdiction of the Commission.

"In view of the great importance of these charges to the shipper, we suggest that the Congress ought to make that service, by express provision in the law, a part of

> the transportation itself. We do not at this time recommend that carriers should be prohibited from using private cars or from employing owners of such cars to perform the icing service if they find that course to their advantage, but we do recommend that these charges should be put on the same basis as all the other freight charges. They should be published and maintained the same as the transportation charge, and be subject to the same supervision and control."

In view of the statements made by the Commission to Congress, it is not a little remarkable to find the Commission now insisting on the breadth of jurisdiction involved in the promulgation of orders such as those here under attack; and it is not without significance that Judge Clements, the only present member of the Commission who was a member of the tribunal when the amendment of 1906 was passed, dissents from the opinion of the majority. In this dissent he is joined by Mr. Commissioner Harlan and Mr. Commissioner Clark, who were appointed as a result of the enlargement of the Commission in 1906. It thus appears that the three Commissioners most closely in touch with the inception of the legislation here under discussion do not share the views entertained by their more recently appointed associates.

It is also proper to observe in this connection, that the District Court interprets the statute as intended to accomplish just what the Commission reported to Congress was its purpose. That this decision was correct is fully established by a consideration of the history and phraseology of the amendment.

It is important to remember that the private ownership of railroad cars, including tank cars used in the transportation of oil, had continued for many years and was well known to the public, to the Commission and to Congress.* In fact the charter of The Pennsylvania Railroad Company

* Special reference is made to the discussion of the subject by the Commission in its Annual Report to Congress for 1891, page 34.

requires it to permit its rails to be used as a highway for the movement of privately owned cars. Act of April 13, 1846, P. L. 312, Section 21; Boyle *vs.* Philadelphia & Reading Ry. Co., 54 Pa. 310 (1867). The Commission itself has referred to this characteristic of the railroad's charter in the case of Hillsdale Coal and Coke Company *vs.* P. R. R. Co., 19 I. C. C. 356 (1910) at page 369. See also the Commission's Report to Congress for 1891, at page 35.

The prevalence of the private ownership of cars used for shipments over the rails of the various railroad companies had an important bearing in determining the Commission's initial views with regard to the tank car question, as appears from the following statement of Mr. Commissioner Bragg in his opinion in the Scofield Case, *supra*, in which he says, at page 77:—

> "Another phase of the statute is presented by this proceeding, namely, that of the shipper furnishing in part his own cars. Long prior to and at the time the Act to Regulate Commerce was enacted there was a prevailing general custom and usage among railroads of the United States of renting cars from each other and from mere car furnishing companies, paying rent for the use of such cars. A like custom and usage then prevailed, and has since, of the carrier paying rent to the shipper for cars occasionally furnished by the shipper for the transportation of his own goods. This amount in each instance then was, since has been, and is now three fourths of a cent per mile. It is part of the legislative history of the country that Congress had pending before it for many years in various forms the general subjects which were afterwards enacted into the Act to Regulate Commerce, and that all these matters were made the subject of lengthy and thorough examination by committees of Congress. We must, therefore, presume, as we heretofore have done, that Congress must have known at the time the statute was enacted of the existence of each of these customs

and usages on the part of the carriers for obtaining cars, and neither of them are forbidden by the statute. If the carrier had been forbidden by the statute from transporting freight over its line otherwise than in its own cars, bulk would have necessarily been broken and cars unloaded by every railroad at the end of its line and there reloaded into the cars of its connecting line, resulting in greatly increased delays and expense in the transportation of freight; and we can well understand why the statute contains no provision requiring the carrier to transport freight only in its own cars."

The references in the Government brief (pages 38 to 45) and in the brief for the Commission (pages 25 and 26), to the debates in Congress clearly indicate that the subject was well understood by that body, but there is not the slightest evidence that Congress intended the carriers to take over the privately owned cars or to provide themselves with special equipment in no way adapted to the safe transportation of commodities.

In view of the prevalence of the private ownership of cars, it is impossible to believe that the Hepburn amendment was intended to change the degree of the obligation of the carriers with respect to furnishing the equipment for the transportation of commodities which were partly or largely transported in privately owned cars of a special description. Certainly, if the Congress of the United States had intended any change of such profound magnitude, and had intended to endow the Commission with a power which the Commission had already decided it did not have, the provisions to this end would have been much more specific and definite than the provisions on which the complainants rely.

The same considerations which moved Commissioner Bragg to deny the power of the Commission under the original act apply with equal force to the amendment of 1906. Thus in the Scofield Case, referred to above, Mr. Commissioner Bragg says, at page 76:—

> "The reference to 'instrumentalities of shipment or carriage' in the first section of the statute proceeds upon the assumption that every railway carrier will, from self interest, as well as in obedience to the law, perform the plain duty to itself and to the public of providing proper and adequate car equipment for all the reasonable needs of its business. The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

The complainants rely, however, on that portion of Section 1 of the Act which has already been quoted on page 5 of this Brief.

The corresponding portion of the Act of 1887 is as follows: "And the term transportation shall include all instrumentalities of shipment or carriage." The effect of the Act of 1906, therefore, is to further define the term "transportation" and to impose on the carrier the obligation to furnish such transportation upon reasonable request. But it is impossible to derive from this general language any substantial basis for contending that Congress meant to require a carrier to discontinue transporting privately owned cars or to provide itself with special equipment to such an extent as to render useless such special cars already privately owned by individual shippers.

It seems clear, therefore, that the requirement to furnish transportation was clearly intended to do no more

than to transmute into an obligation under federal law the common law obligation of the carrier in this regard. That obligation required the carrier to furnish transportation upon reasonable request and to transport safely the goods entrusted to it, and the decisions cited in the complainants' brief are all illustrative of this rule.

Moreover, since, as will be shown, the common law obligation did not extend beyond the furnishing of vehicles reasonably adapted to the safe transportation of the commodities carried, it becomes unnecessary to discuss the meaning of the word "provide" in that portion of Section 1, quoted above in this brief, on which word the appellants place so much reliance.

2. THE COMMON LAW DOES NOT REQUIRE RAILROAD COMPANIES TO FURNISH A SPECIAL TYPE OF VEHICLE HAVING NO REFERENCE TO THE SAFETY OF THE TRANSPORTATION.

But there never was an obligation at the common law to supply a vehicle of a particular form or description when such form or description had no reference to the *safety* of transportation. In the present instance, the special vehicle which the Commission attempts to require the carrier to purchase adds nothing to the safety of transportation, but merely is alleged to increase the economy of transportation to the shipper, by relieving him of the cost of confining his property in packages suitable for shipments and by facilitating its loading and unloading.

It is confidently submitted that no such obligation ever existed at common law. It is confidently believed that not a single Court decision can be cited in support of the proposition. On the contrary, all the cases decided by the Courts with reference to the duty to furnish equipment of a specialized character are found on examination to be merely illustrative of the duty to furnish *safe* transportation. The typical instance is the refrigerator car, and the principal cases will be found in a note to the case of Forester *vs.* Southern Ry., 147 N. C. 553, 18 L. R. A. (N. S.) 508 (1908). See also Atlantic Coast Line Ry. Co. *vs.* Geraty, 166 Fed. 10, 20 L. R. A. (N. S.) 310 (1908).

It requires but a cursory examination of the cases, including those cited by the appellants, to find that the general language used is directed to the duty of the carrier to transport safely. It is for this purpose that the vehicle must be adequate.

The point is well illustrated in the leading case of Beard *vs.* Illinois Central R. Co., 79 Iowa 578 (1890), cited by the complainants. The comments in that case with reference to the duty to furnish adequate equipment clearly mean that the carrier must answer for the safety of the commodities it undertakes to transport—its long-established duty—and cannot excuse its dereliction in this regard because of its non-ownership of the type of equipment requisite for this purpose. The Court says:—

> "We may here assume that defendant will be excused from using refrigerator cars. But it is shown that the butter could have been carried safely by the use of ice in the box cars. It was defendant's duty to use it. But, having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it, on the ground that it did not have cars sufficient for that purpose."

This is the principle which emerges from the decisions cited by the appellants, but it is impossible to find in any one of them, or in a decision of any Court that has come to the attention of counsel for the Railroad, support for the proposition that the carrier is required to furnish a vehicle of a special character having no connection with the safety of the transportation.

In the case of Covington Stock Yards Co. *vs.* Keith, 139 U. S. 128 (1891), cited by the Government at page 16 of its brief, the Court was speaking primarily of the duty to provide for the delivery of the commodity carried, not as to the specific method of fulfilling that duty.. Thus, in the present case, the Railroad admits its obligation to transport and deliver oil, but denies the existence of any obligation to do this in a particular manner which has no reference to the safety of the service.

In the case of the State *vs.* Cincinnati, etc., Ry. Co., 47 Ohio State, 130 (1890), cited by the Government on page 24 of its brief, what is said as to the duty of the railroad company to provide facilities for transportation is *purely incidental to the question of whether any discrimination in rates had been established.* This is put beyond question by the judgment entered by the Court which is restricted to the question of rates. Furthermore, the vital issue was discrimination; and it is entirely unnecessary to consider what, if any obligations, with respect to special vehicles might be predicated on the general obligation which requires a carrier to serve its patrons without undue discrimination, since *the complaints in the present cases are aboslutely devoid of any allegation of discrimination,* and there is no finding by the Commission which even remotely would support the inference that any discrimination had resulted to either the Pennsylvania Parafine Works or the Crew-Levick Company in the matter of car supply.

In fact neither in the original complaints nor anywhere else in the record is there an obligation that the oil companies have been discriminated against either because of the general fact that many tank cars are privately owned, or because of the actual service accorded by the carrier.

The arguments put forward by the Government (page 69) of its brief find absolutely no support in the facts as presented by this record.

The case of Cincinnati &c. Ry. Co. *vs.* Fairbanks & Co., 90 Fed. 467 (1898) cited on page 25 of the Government's brief, merely holds that the railroad is responsible for the safety of the goods delivered to it though moving in cars privately owned. It cannot properly be cited for the broad proposition contended for by the Government.

And this is believed to be the significance of the decisions of this Court in Chicago, Rock Island, etc., R. Co. *vs.* Hardwick Farmers Elevator Company, 226 U. S. 426 (1913), Interstate Commerce Commission *vs.* Illinois Central R. Co., 215 U. S. 452 (1910), and the other decisions

cited on page 30 of the Government's brief and page 20 of the Commission's brief, all of which as well as the cases cited on pages 20 and 21 of the Government's brief involve ordinary equipment only. The only principle which can be legitimately drawn from these cases, so far as the present controversy is concerned, is that Congress has legislated with reference to the carrier's duty to furnish to shippers cars and facilities for transportation. There is not the slightest support in either case for the proposition that the legislation of Congress is intended to require the furnishing of a vehicle of a special description. The character of the equipment is for the carrier to determine, with the qualification, perhaps, that the carrier must answer for the safety of the goods which it transports.

The true principles to be derived from the cases, not only those cited by the appellants, but others, are (*a*) that a carrier is required to respond in damages if it fails to transport *safely* the goods which it offers to carry, and it cannot excuse itself from this liability on the ground that its equipment was not adapted to the transportation of the commodity accepted; and (*b*) that Congress has legislated in Section 1 of the Act to Regulate Commerce with reference to the duty of the carrier to furnish to its shippers cars and facilities for transportation, but has not legislated with reference to the precise character of the vehicles of transportation. Beyond these principles the cases do not go, and the principles which the appellants seek to draw from them evince a misconstruction of their true meaning and a misapplication of the rules which they establish.

Moreover, it is earnestly denied that The Pennsylvania Railroad Company has held itself out as ready to furnish to an unlimited extent tank cars for the transportation of oil. As stated in the Commission's brief (page 29) the Railroad Company's rates on oil in tank cars are published subject to the general provision of its tariffs that in providing ratings for articles in tank cars, it does not assume any obligation to furnish tank cars. It is also denied that a finding by the Interstate Commerce Commission that there was a holding out under the circumstances referred

to is a finding as to a question of fact. Whether or not the publication of rates in the manner referred to, and the fact that the railroad company furnished such cars as it had, constituted a holding out within the legal meaning of the term is a question of law for the Court to decide. In fact the very announcement referred to expressly negatives the holding out of a readiness to supply tank cars generally.

So long as there is no unreasonableness or discrimination in the rates, and so long as the carrier's equipment is adapted to the safe transportation of the goods entrusted to it, there is nothing in Section 1 which in any way restricts the right of the carrier to choose and select the vehicle of transportation which it regards as most satisfactory for the conduct of its business. The carrier therefore fulfills its full obligation under this section when it is prepared to transport the shipments offered to it when properly packed and prepared for shipment in accordance with its regulations in this regard.*

It cannot be denied that the obligation which is asserted to exist is one of vast and far-reaching character, and it could never have been the intention of Congress that a generalized statement such as is found in the concluding por-

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* It is hardly necessary to cite authorities in support of the proposition that the carrier is entitled to prescribe reasonable rules and regulations with reference to the manner and form in which shipments will be received for transportation; but it may not be amiss to call attention to the following:—

Harp *vs.* Choctaw, etc., R. Co., 125 Fed. 445, at page 449 (1903);

U. S. *vs.* Oregon Navigation Co., 159 Fed. 975, at page 979 (1908);

Oxlade *vs.* Northeastern Ry. Co., 15 C. B. (N. S.) 680 (1864);

Robinson *vs.* B. & O., 129 Fed. 753 (1904);

Millinery Jobbers' Assn. *vs.* American Express Co., 20 I. C. C. 498 (1911).

These cases and many others which might be cited, fully justify the response of the Railroad Company's General Manager to the complainants' demand that the Railroad Company increase its tank car equipment.

tion of the second paragraph of Section 1 should be construed to enlarge the obligations of carriers to the extent contended in this case. The whole history of legislation with respect to the obligations of carriers disproves such a contention.

Moreover the obligation, such as it is, which is imposed upon the carriers by the provisions of the first section of the Act to Regulate Commerce, relates to the vehicles already owned by the carriers. This is abundantly proved by the language of the Act itself, adverted to in the following passage from the opinion of the District Court:—

> "We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power. On the other hand, we find in the act, by clear expression, duties imposed upon carriers which are not absolute in their nature, but are qualified by the ability of the carriers to conform to the duties prescribed.
>
> "The provision of the act requiring a carrier to maintain and operate switch connections with lateral or branch line railroads, appearing in the last paragraph of the first section of the act, imposes upon a carrier the duty to 'furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.' The words 'to the best of its ability,' of course, qualify the duty to maintain switch connections, and do not qualify the prohibited discrimination.
>
> "Again, in section 3 of the act, it is provided that 'every common carrier shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering

of passengers and property.' Here, again, the carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them 'according to their respective powers.' Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them, whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the definition of 'transportation,' added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission, and vested in the Commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not a violation of the statute, and the order of the Commission directing the carrier to desist from that practice was an exercise of power not conferred by law."

3. HAD CONGRESS INTENDED TO IMPOSE AN OBLIGATION, SUCH AS THE COMMISSION HAS ASSERTED IN THESE CASES, SO IMPORTANT A PURPOSE WOULD NOT HAVE BEEN LEFT TO INFERENCE.

The Safety Appliance Acts indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers, it covers the subject by careful specific rules. Moreover, it is pertinent to inquire why committees of Congress should consider, as they continue to do from time to time, the wisdom of devolving on carriers the duty to furnish steel coaches for passenger traffic, if already the

provisions of the Act to Regulate Commerce are broad enough to cover matters of this kind.

Furthermore, in its twenty-seventh annual report, the Interstate Commerce Commission recommends (page 82), that the Commission "be empowered * * * to require the adoption and use of steel or steel under-frame cars in passenger train service." The steel passenger coach is directly adapted to secure the safety of passenger transportation. It is therefore a means of accomplishing the admitted obligation of the carrier to furnish safe transportation, and yet the Commission itself recognizes that the Act as at present drawn does not impose on the carrier the obligation to furnish such equipment.

How much less can it be contended that the carrier is required by the Act to furnish tank cars which have no relation whatever to the safety of transportation, but relate only to the convenience of the shipper.

As stated by Mr. Commissioner Bragg in the Scofield case, 2 I. C. C. 67, "A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

II. Even if the Act to Regulate Commerce imposed upon a railroad the duty to furnish tank cars, the Commission has chosen the wrong method to enforce the obligation.

I. THE VARIOUS PROVISIONS OF THE ACT TO REGULATE COMMERCE, WHEN CONSIDERED IN THEIR RELATION TO EACH OTHER, INDICATE CLEARLY THAT THE COMMISSION IS WITHOUT AUTHORITY TO ENTER AN ORDER OF THE CHARACTER INVOLVED IN THESE CASES.

As the Court well knows, the legislation known as the Act to Regulate Commerce has been evolved by a series of amendments to the original Act of 1887. A recognition of this fact will be of material service in determining the proper meaning of its provisions.

The Commission has predicated its order on the obligation which is assumed to arise from the provision of Section 1, which has been commented on in the first portion of this Brief, and from the requirement of Section 12 that "the Commission is hereby authorized and required to execute and enforce the provisions of this Act." The point which, in this portion of this brief, is urged upon the Court is that, even asuming the correctness of the position of the Commission and of the Government as to the meaning of Section 1 of the Act, and assuming the Commission's duty to enforce the Act, *the Commission has chosen the wrong method to accomplish the desired result.* That is to say, it has selected the wrong proceeding for the exertion of its authority; and this is not merely a technical mistake but is a mistake of the utmost importance, since it has sought to invoke the highly penal provisions of the Act to enforce an obligation which is not intended to be enforced in this manner.

The provision of Section 12 which has just been quoted was incorporated in the Act to Regulate Commerce by an amendment passed in 1889; but this amendment included that portion of Section 12 which immediately follows the part quoted. This portion, which has been omitted in the Commission's opinion and also in the Government's brief, is as follows:—

> "and, upon the request of the Commission, it shall be the duty of any District Attorney of the United States to whom the Commission may apply to institute in the proper Court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the Courts of the United States."

The second portion of this amendment of 1889, just quoted by us, clearly discloses the method by which the

Commission was at that time intended to execute and enforce the Act.

Furthermore, a new section was added to the Act in 1889, designated Section 23, as follows:—

> "That the Circuit and District Courts of the United States shall have jurisdiction upon the relations of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier, for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact as undetermined, upon such terms as to security, payment of money into the Court, or otherwise, as the Court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement."

It will be observed, therefore, that the Act, as it stood at that time, contained a specific provision having to do with the furnishing of cars or other facilities for transportation, and it was under the Act as thus amended that the Commission in the case of Rice *vs.* Cincinnati Railroad,

3 I. C. R. 841 (1892), decided that the decision in the Scofield case must be adhered to.

With the passage of time, however, the remedies afforded by the Interstate Commerce Act were found to be inadequate to accomplish the character of regulation desired by Congress and new obligations were devolved on the carriers, and new methods of enforcing these obligations were annexed thereto in order to accomplish the desired end. *In creating this new machinery, however, it was not made co-extensive with all the obligations of the Act, but was limited to the cases specified.*

A simple example of this is found in the amendment to Section 20 of the Act, commonly known as the Carmack Amendment, which imposes on an initial carrier a through liability for the transportation of the freight which moves from a point on its line to a point on some other line outside of the State of origin. The Commission has consistently denied that it has any authority to enforce this provision of the Act to Regulate Commerce. In other words, the machinery provided for the enforcement of the Act does not, in this instance, include the exertion of the tremendous power to issue a penal order which has been asserted in these proceedings.

Blume & Co. *vs.* Wells, Fargo & Co. 15 I. C. C. 53 (1909);

Joynes *vs.* P. R. R., 17 I. C. C. 361 (1909);

Atlas Portland Cement Co. *vs.* L. V. R. R., 32 I. C. C. 487 (1914).

The specific method which the Commission seeks to use in the present instance to enforce the obligation which it assumes to exist under Section 1 of the Act is the method provided in Sections 15 and 16 of the Act: that is to say, the entry of an order in a proceeding initiated before it by the filing of a complaint by some person, firm, corporation or association. *There is absolutely no question that this is the power sought to be exercised. That these cases originated with complaints filed under the authority of Section 13,*

and that the procedure is in accordance with Sections 15 and 16, appears from the record, and it is idle for the Government or the Commission to attempt to deny that the Commission is acting under the sections of the Act referred to. In fact, this is clearly conceded by the Commission itself on page 188 of its opinion (R. 24).

The Commission has entered an order to remain in effect for two years, and enforceable, if valid, by a fine of $5000 a day in case of disobedience. But the instances in which an order of this character may be entered are restricted in Section 15 to cases in which some rate, regulation, classification or practice is claimed to be unjust, unreasonable, or unduly discriminatory. This section reads as follows:—

> "That whenever, after full hearing *upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order of investigation and* hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that *any* individual or joint *rates or charges* whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint *classifications, regulations,* or *practices* whatsoever of such carrier or carriers subject to the provisions of this act *are unjust* or *unreasonable* or *unjustly discriminatory,* or *unduly preferential* or *prejudicial* or *otherwise* in *violation of any of the provisions of this Act,* the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint *rate or rates, charge or charges, to be thereafter observed* in such case as the maximum to be charged, and what individual or joint *classification, regulation* or *practice* is *just, fair* and *reasonable,* to be thereafter followed, *and to make*

> *an order* that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. *All orders of the commission,* except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, *and shall continue in force for* such period of time, *not exceeding two years,* as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction." [Italics ours.]

It need not be argued in this case that there is involved no rate, regulation or classification. The only word upon which the decision can be based is the word "practice." Under the well settled rule, this word must be interpreted with reference to its context, and as intended to refer to a matter *ejusdem generis.* If the word "practice" can be interpreted to justify what has been attempted in the present cases, it is manifest that the Commission could control every incident of railroad management and operation. This is recognized by the dissenting Commissioners in the present cases. Thus, Mr. Commissioner Clark says on page 195, in his dissenting opinion:—

> "If the Act confers upon the Commission power to order a carrier to enlarge its complement of cars and to award damages against it if it fails to comply with such order, it seems logically and necessarily to follow that the Commission has the same power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. In fact, no facility of transportation is exempt. I think that this power is vested in the courts

and not in the Commission. For the reasons that were more fully stated in the dissent in the Vulcan Coal Mining Co. case, I am not able to accept the views of the majority on this point."

The dissenting opinion in the Vulcan case referred to by Mr. Commissioner Clark, which was concurred in by Mr. Commissioner Harlan and Judge Clements, is so apposite that it has been printed as an Appendix to this brief.

There is another consideration which is believed to place beyond controversy the proposition that Sections 15 and 16 do not justify an order of the character entered in this proceeding.

On reference to Section 1 of the Act, it will be found that it is, in general, an enumeration of certain duties imposed on the carrier by the Act. Most of these provisions refer to duties connected with transportation which the carriers are required to fulfill. Sections 2, 3 and 4 are primarily intended to bring about equality of treatment as among shippers. Section 5 deals with pooling agreements, while Section 6 relates to the filing of tariffs. It will be observed, therefore, that Section 1 is primarily concerned with the fundamental things which the carrier shall and shall not do, separate, and distinct from the obligation to treat its patrons with equality, in respect of those things which it does or does not do.

Now, in this Section 1 there are sundry provisions, among them the mandate to furnish transportation upon which the Government relies, the provision that charges shall be reasonable, the provision that just and reasonable classifications of property and that just and reasonable regulations and practices affecting classification, rates, &c., shall be observed, the anti-pass provision, the commodities clause, and the provision requiring the construction, maintenance and operation of a switch connection in proper cases. *It does not at all follow that all of these obligations are enforceable in the same manner.* In fact, Section 1 itself specifically declares the method of enforcing the obligation to furnish a

switch connection. In all probability a violation of the requirement that a railroad shall furnish transportation would be available directly in favor of a shipper in a proper proceeding to recover damages for a breach of the obligation. It is respectfully submitted that the *machinery of redress provided in Sections 15 and 16 of the Act is limited to the obligations established in the third and fourth paragraphs of Section 1,* which read as follows:—

> "All *charges* made for any service rendered to or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, *shall be just* and *reasonable;* and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages; and provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.
>
> "And it *is hereby made the duty of all common carriers* subject to the provisions of this Act *to establish, observe, and enforce just and reasonable classifications* of property, *for transportation, with references to which rates, tariffs, regulations, or practices* are or may be made or prescribed, and *just and reasonable regulations and practices* affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property, for transportation, the facilities for transportation, the carrying of personal, sample and excess baggage, and all other matters relating to or connected with the receiv-

ing, handling, transporting, storing, and delivering of property subject to the provisions of this Act which may be necessary or proper to assure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful."

The Court is earnestly asked to compare the language of these paragraphs with the language of Section 15 quoted above. Such a comparison will disclose beyond question, it is believed, that the Congress intended to provide in Sections 15 and 16, the machinery for enforcing the provisions in the paragraphs of Section 1 referred to.

Finally the debates in Congress show beyond peradventure that the extraordinary powers conferred upon the Commission is Sections 15 and 16 of the Act *were primarily intended to secure the effectiveness of the regulation of rates and the matters incidental thereto,* and this is confirmed by the fact that in many instances special remedies are provided for breaches of the obligations of the Act. Thus in Section 1, there is a special remedy for violations of the anti-pass provisions, and another special remedy for failure on the part of a carrier to install a siding connection. The very fact that in this second instance special reference is made to Section 15 indicates that the remedies of that section would not otherwise be available. There is an obvious similarity between the furnishing of a siding connection and the furnishing of vehicles to be used for the transportation.

Again, in Section 6, there is a specific remedy in case of failure or refusal on the part of the carrier to comply with the terms of any regulation adopted and promulgated by the Commission under the provisions of that section, and another separate remedy for the misquotation of rates.

Again in Section 10, there are special penalties provided for the mis-billing of freight, and for other offenses there described. Likewise, in Section 20, specific remedies are provided. It is unnecesary to extend this discussion. What has been said clearly proves that not all obligations of the Act are intended to be enforced by orders of the Commission, and all proper considerations indicate that the obligations imposed by Section 1, whatever they may be, with respect to furnishing of cars, are not enforceable in the manner which the Commission has adopted in the present instance.

It was the rate-making function and related powers that were intended to come within the special remedies of Sections 15 and 16 of the Act, and not a duty such as that here asserted, which is totally unrelated to the matters which Congress had in mind in devising the machinery for securing the effectiveness of rate-making. Herein is found a full answer to the contention of the Government on page 48 of its brief, that the fact that this remedy may be a more effective remedy than mandamus proves that it exists. This is obviously a *non sequitur*. And besides it remains to be established that the remedy is more effective in cases of this character than the ordinary judicial remedies.

2. THE PROVISIONS OF SECTION 15 OF THE ACT TO REGULATE COMMERCE, THE SECTION UNDER WHICH THESE PROCEEDINGS WERE BROUGHT, INDICATES CLEARLY THAT THE COMMISSION IS WITHOUT AUTHORITY TO ENTER AN ORDER OF THE CHARACTER INVOLVED IN THESE CASES.

This case involves no rate, no regulation, no practice. It needs no argument to show that no rate is involved, and it is believed that none is needed to show that no regulation is attacked. What "practice" is called in question? Will the appellants say that it constitutes a "practice" within the meaning of the Act for the carrier to furnish only five hundred tank cars? It might as well be contended that it

constitutes a practice within the meaning of the Act for the carrier to provide a certain building as its station at Philadelphia, and that this practice can be investigated by the Commission and the carrier required to pursue a different practice, viz., to build and maintain a station in the said city costing not less than thirty million dollars.

If the suggested argument were sound, it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the Act, why should the Commission ask that it be empowered to require the use of the block signal system? (Report of 1913, page 82.) Why should the Commission make this request if, because of its jurisdiction with respect to practices, it is already endowed with power to regulate the details of operation of carriers? The presence of non-technical words in statutes almost invariably leads to some vagueness of meaning and some uncertainty of import, but it is not believed that the word "practice" contains sufficient vagueness or uncertainty to lend the least support to the contention of the complainant. The following definitions of the word, taken from the best dictionaries, are worthy of reference:—

Thus the Standard Dictionary defines the word: "Any customary action or proceeding regarded as individual; habit; as, the *practise** of almsgiving; the *practise* of chewing tobacco. An established custom; a prescribed usage; as the *practise* of shaking hands."

The Century Dictionary gives the following definition: "Frequent or customary performance; habit; usage; custom."

The Oxford Dictionary, the most complete and scholarly of modern dictionaries, gives the following definitions: "The habitual doing or carrying on of something; usual, customary, or constant action." "A habitual way or mode of acting; a habit, custom; (with *pl.*) something done constantly or usually; a habitual action."

While the word "practice" has certain other uses, an

* The Standard Dictionary spells the word with an "s."

examination of any of the dictionaries will indicate that the above definitions explain the meaning of the word as it is used in the Act to Regulate Commerce.

The language of the Act itself supports this interpretation of the word. Thus in Section 15 the Commission is authorized to prescribe "the just and reasonable * * * rate or rates * * * to be thereafter observed * * * and what * * * regulation or practice is just, fair and reasonable *to be thereafter followed*, and to make an order that the carrier or carriers shall * * * conform to and observe the regulation or practice so prescribed."

It is manifest that the use of the word "followed" indicates a continued method of operation and not merely a single act. The same conclusion results from the requirement that the carrier shall observe "the regulation and practice so prescribed." This phraseology clearly indicates that the "practice" which the Commission may impose on the carrier is inherently similar in character to the regulation. In other words, the implication is inescapable that the words are essentially similar in import, and the probability is that the intention was to endow the Commission with power to regulate practices which might be covered by regulations, but which had not been specifically so defined.

The decisions of the Commission clearly indicate an acceptance of this interpretation of the word. By virtue of the grant of power implied in this word, the Commission has regulated the methods of distributing coal cars. Rail & River Coal Co. *vs.* B .& O. R. R. Co. *et al.*, 14 I. C. C. 86 (1908). Hillsdale Coal & Coke Co. *vs.* P. R. R. Co. *et al* 19 I. C. C. 356 (1910). Interstate Commerce Commission *vs.* Illinois Central Ry., 215 U. S. 452 (1910). A scheme of car distribution constitutes a continued method of operation. So also a custom of a railroad company to receipt for certain freight "shipper's load and count." Ponchatoula Farmers Assn., Ltd. *vs.* Ill. Central Ry., 19 I. C. C. 513 (1910). The practice pursued in permitting the transportation of premiums in packages; Ouerbacker Coffee Co. *vs.* So. Ry. Co., 18 I. C. C. 566 (1910). Simi-

larly a method of delivery has been dealt with by the Commission: Wholesale Fruit, etc., Assn. *vs.* A. T. & S. F. Ry. Co., 14 I. C. C. 410 (1908). The transit privilege, *In re* Rates, etc., on Wool, 23 I. C. C. 151 (1912). Fabrication in transit, 29 I. C. C. 70 (1914), and numerous other cases relating to the transit privilege. Compression of goods in transit, Merchants, &c., Co. *vs.* I. C. R. R., 17 I C. C. 98 (1909). Concentration in transit, Meredith *vs.* St. Louis, &c., Ry., 23 I. C. C. 31 (1912). Dumping and trimming, New England Coal & Coke Co. *vs.* N. & W. Ry., 22 I. C. C. 398 (1912). Storage, Commercial Club of Duluth *vs.* N. C. Ry. Co., 13 I. C. C. 288 (1908). Furnishing of car stakes, National Wholesale Lumber Dealers' Assn. *vs.* A. C. L. R. R., 14 I. C. C. 154 (1908). Notifying shipper of refusal of freight, Kehoe *vs.* N. C. & St. L. Ry. Co., 14 I. C. C. 555 (1908). Scaleage deductions, Baltimore Chamber of Commerce *vs.* P. R. R. *et al.*, 15 I. C. C. 341 (1909). And see the case of Loomis *vs.* L. V. R. R., 240 U. S. 43 (1916), cited on page 60 of the Government's brief, and the cases which are cited in conjunction therewith.

The cases disclosing the Commission's understanding of the word "practice" could be multiplied, but the foregoing are amply sufficient to show that the word is used in the Act in its customary sense and contemplates a continued method of operation, which might possibly be covered by a formal regulation.

If it had been the intention of Congress to endow the Commission with power to require the purchase of equipment of specialized character, is it not reasonable to suppose that Congress would have defined the manner in which, and the extent to which, this great power might be exercised? A power to require the purchase of equipment necessarily involves some power with reference to the character of the equipment to be purchased. Will it be contended that the Commission has the right to prescribe just what price shall be paid for cars, of what capacity they shall be, what method of construction shall be observed in

their manufacture? Even the subject of safety appliances has been carefully regulated by Congress by a specific statute. Will it be supposed, then, that Congress intended to confer a power of far greater magnitude by the grant in general terms of the power to require that reasonable practices shall be followed. The suggestion is preposterous.

In this connection it should not be forgotten that the tank really supplies the place of the package and relieves the shipper of the necessity of providing such package. *The car is not adapted to the shipment of goods in packages* as are box and gondola cars which are sometimes used for the transportation of commodities in bulk, but is *adapted only* to the transportation of liquid articles unconfined in any package. The shippers are asking in effect, therefore, that the railroad be required to furnish the package for their commodity, and this has been recognized by the Commission in various of its decisions. Thus in the case of Independent Refiners Assn. *vs.* Western N. Y., etc., Ry., 4 I. C. R. 162, the Commission says, at page 170: "The tank of the tank car performs the function of the package in tank shipments as the barrel does in barrel shipments." See also Rice *vs.* Cincinnati, etc., Ry. 3 I. C. R. 841, at page 848, and the Annual Report of the Commission for 1891, found in 3 I. C. R. 757, at page 775.

To require the carrier to purchase additional equipment may involve a demand that the carrier increase its capital account, and the power of the Commission can only properly be determined by a consideration of its right to require such action on the part of the railroads. For, if the Commission is endowed with power of this character, its power should be plenary. It is obvious that no such power exists, since the railroads are still subject to the requirements of the States with respect to the increase of capital and indebtedness. The Act to Regulate Commerce provides no method for the increase of the stock or bonds of railroads when new capital is needed in order to increase the carrier's equipment.

When it is remembered that the Commission as early as

1888 had denied its power to require the purchase of tank cars, it is inconceivable that Congress should have intended to endow it with this great power by the general language used in the Act. If such power had been contemplated, clear and definite words would have been used, which would have placed the existence of the power beyond controversy. Reference may again be made to the Safety Appliance Laws as indicating the care with which Congress provides the extent of the carrier's obligation in respect of the equipment to be furnished.

It is to be further noted that the power for which the complainants contend is not a power to require the carrier to furnish transportation, *but a power to furnish vehicles of a special type, of a type which has nothing to do with the safety of the transportation, but which is alleged merely to increase the commercial convenience* of the shipper. It is difficult to believe that Congress would consent in any event to impose so serious a burden upon the railroads of the country; but if it could be persuaded to do so, it is manifest that its requirements in this regard would be so clear and definite as to leave no room for argument.

It is impossible that the Court will accord much consideration to the contention of the Government that "whether a particular manner of doing business constitutes a practice is a question of fact which, in case of dispute, is for the Commission to determine" (brief for the United States, page 59). The cases cited in support of this proposition do not sustain it, since the Court itself, in the decisions referred to, determined whether or not the controversy was within the jurisdiction of the Commission. To permit the Commission to determine finally whether or not a given controversy involves a "practice" within the meaning of the Act would be to enable it to define the limits of its own jurisdiction. This would be contrary to the settled rule that it is a question of law whether or not a given controversy is within the jurisdiction of the Commission. Thus in the case of the Interstate Commerce Commission *vs.* Union

Pacific Railroad Company, 222 U. S. 541 (1912), this Court, in enumerating the classes of cases in which the Courts may review an attempted exercise of power by the Commission, includes the case which raises the question whether the power attempted to be exerted is "beyond its statutory power."

The meaning of the word "practice" involves a question of statutory construction and necessarily presents a judicial question. Further, it does not involve the determination of some controversy upon which expert administrative knowledge is required, and is distinguished also in this regard from the cases cited by the Government in support of their extraordinary contention.

Finally it may properly be asked why the Commission should recommend, as it has done in its reports (Report of 1913, page 82), as well as in previous reports, that it be endowed with authority to require the railroads to purchase steel passenger cars if the provisions of Section 15 of the Interstate Commerce Act are already sufficient to enable it to require the purchase of tank car equipment. The steel passenger coach has a direct relation to the safety of transportation, which is admittedly an obligation of the carrier. It is not a specialized form of equipment restricted in the scope of its use, but is available generally for all passenger transportation. Since the Commission concedes its lack of power under the present law to require the purchase of steel passenger cars, a conclusion which is obviously shared by Congress, how much more is the Commission without power under the present act to order the purchase of tank cars, which have nothing to do with the safety of transportation, and constitute a specialized character of equipment available for use only in connection with a limited class of shipments.

This was fully realized by Mr. Commissioner Bragg, when he said, in the Scofield Case, *supra*, at page 76:—

> "The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply

> equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

The foregoing discussion shows that *the word "practice," as used in Section 15, does not include the duty to furnish transportation,* since *that duty is separately dealt with in paragraph 2 of Section 1. Practices are incidental matters* connected with the performance of the service of transportation, and the nature thereof is clearly outlined by the specific language used by Congress in the fourth paragraph of Section 1.

It follows, therefore, that the requirement of Section 1 as to furnishing transportation—whatever may be its true scope—*is not a requirement which is enforceable by an order of the Commission entered in accordance with the procedure outlined in Sections 15 and 16, and carrying with it the tremendous penalties provided in those sections.*

Section 13 of the Act has no application to the present proceeding, except in so far as it permits a complaint to be made of any violation of the Act to Regulate Commerce. The section does not confer authority upon the Commission to enter an order of the character described in Sections 15 and 16 upon *any* complaint. The only portion of Section 13 which confers upon the Commission the right to enter an order is the concluding portion dealing with *investigations instituted by the Commission on its own motion.* This provision is as follows:—

> "And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the

provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or things concerning which the inquiry is had excepting orders for the payment of money."

The portion of Section 15 quoted on page 19 of the Complainant's Brief and reading as follows, clearly has nothing to do with the case:—

"The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act."

This is not a grant of new power, but only the statement that the grant of the power in question shall not exclude the exercise of any other power which may have been conferred.

Since the Government and the Commission cannot deny that the present proceedings have resulted from complaints filed with the Commission, it follows that the extraordinary power to issue orders enforceable by the imposition of a penalty of $5000 per day does not apply, since such an order is permitted to be entered only in a proceeding founded upon a complaint dealing with a rate, regulation, classification, or practice. While the Commission has a right to investigate other complaints dealing with alleged violations of the Act to Regulate Commerce, its power of enforcement is not by the entry of an order, but by the other machinery provided in the Act, for example, that found in Section 12, and in the ninth paragraph of Section 20 of the Act, which reads as follows: —

"That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier,

to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them."

The decisions clearly sustain the case of the Railroad Company. Thus the order entered in the case of B. & O. R. R. *vs.* Interstate Commerce Commission, 221 U. S. 612 (1911), and Interstate Commerce Commission *vs.* Goodrich Transit Company, 224 U. S. 194 (1912), *were both sustained under Section 20 of the Act,* which specifically authorizes the Commission to require reports, &c. In no way do they indicate any disposition on the part of this Court to enlarge the right to enter an order in a case coming before the Commission on complaint as prescribed in Sections 15 and 16.

The very fact that Section 20 of the Act prescribes a specific means for its enforcement, viz., a penalty of $100, for each and every day a carrier fails to comply with a requirement of the Commission, confirms the contentions of the Railroad Company that it is not every provision of the Act that is enforceable by the penal order provided for in Sections 15 and 16 of the Act.

The case of the Atchison Railroad *vs.* United States, 232 U. S. 199 (1914), involved what is admitted to be a practice and therefore was properly within the scope of Section 15. Moreover, the contest in this case was with regard to the right to perform the service not with regard to the obligation to do so.

Apparently the Government realizes the difficulty of maintaining its position that the present proceedings involve a practice within the meaning of the Act to Regulate Commerce, since the cases which are cited in support of this proposition are far from sustaining it, and there is consequently (page 61 of the Government's brief) an effort to justify the order even if the controversy does not involve what is strictly a practice. But this particular section of the Government's argument fails to point out the statutory provision which would justify the conclusion sought to be reached. The Pipe Line Cases, 234 U. S. 548 (1914), the only decisions invoked, are

distinguishable because, as has just been pointed out, they involved an investigation begun by the Commission itself, and furthermore, no contention was presented in the case that the order was not within the scope of the Commission's authority if the obligation in question was devolved upon the Pipe Lines by the Act. In the absence of an attack on the procedure adopted by the Commission, the case is without bearing upon this feature of the controversy.

III. The order of the Commission is not administrative in character, but is uncertain, indefinite and unlawful.

Mr. Commissioner Meyer, in his opinion, has contended that the Commission has jurisdiction in this case because administrative questions are involved, but the order which the Commission has entered is not administrative in character, but, on the contrary, distinctly legislative in its essential nature. The important portion of the order is as follows:—

> "It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before Auugst 15th, 1915, and thereafter to furnish, upon reasonable request and reasonable notice at complainants' respective refineries, tank cars in sufficient number to transport said complainants, normal shipments in interstate commerce."
>
> "It is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect."

Except for the fact that this order runs in favor of the particular complainants, it is a legislative command, and it is obvious that the Commission has sought to use phraseology closely resembling the rule of law with regard to the furnishing of service on the part of a common carrier, with this qualification that they have required in the order

that the service to be accorded shall be the furnishing of tank cars.

The order says that the cars are to be furnished upon *reasonable* request and *reasonable* notice "in sufficient number to transport said complainants' *normal* shipments in interstate commerce." What is reasonable notice? The definition of this would constitute a customary exercise of the administrative function. So also a statement of the number of cars which would be sufficient for the complainants' normal shipments would constitute an exertion of administrative power, but these truly administrative problems are left unsettled and the Commission contents itself with enunciating a legislative principle as applicable to the specific situation, but seeks to give it the sanction of a penalty of $5000 per day by assuming to enter it under the authority of Sections 15 and 16 of the Act.

In their efforts to escape the obvious defect of the order, counsel for the Government have sought to use a portion of the Commission's opinion as indicating what would be the normal shipments of the complainants and they have referred to what the Commission says at the bottom of page 183 and the top of 184 of its opinion (R. 33, 34, referred to in the Government's brief on page 80) as to shipments which, in the period designated, were made by the complainants.

But the answer to this contention is so obvious as hardly to require statement. It will be remembered that the fundamental complaint of each petitioner was that it did not receive enough cars for its normal shipments *and unless these complaints were unfounded, it would follow that the shipments actually made were not normal shipments.*

Furthermore, the Commission has not stated that the carriers might treat as the normal shipments of the complainants, which they should prepare to transport, the volume of shipments made in the past.

The order of the Commission, therefore, leaves the railroad with an uncertain, indefinite standard of conduct which, however, it must observe, at a risk of a penalty of

$5000 per day, and this penalty runs against all its officers and agents who may be responsible for obedience to the Commission's order. Surely this was never intended by the Act to Regulate Commerce, nor would it be constitutional. Clear authority will be found in the case of International Harvester Company *vs.* Kentucky, 234 U. S. 216 (1914), and Collins *vs.* Kentucky, 234 U. S. 634 (1914), both of which require that a definite rule of conduct shall be laid down before penalties may be imposed.

Furthermore, that the question before the Commission is not administrative in character is clearly indicated by the fact that the Supreme Court of the United States has sustained Court actions for failure to furnish equipment in the cases of Louisville & Nashville R. R. Co. *vs.* Cook Brewing Co., 223 U. S. 70 (1912); Eastern Ry. *vs.* Littlefield, 237 U. S. 140 (1915); Pennsylvania Railroad Company *vs.* Puritan Coal Mining Company, 237 U. S. 121 (1915), and Illinois Central Railroad Company *vs.* Mulberry Hill Coal Company, 238 U. S. 275 (1915). (See the Government's brief, page 65, and the Commission's brief, pages 34 to 38). In the last case, decided June 14, 1915, the Court, after discussing the Puritan case, clearly indicates that no administrative question is involved in an action brought to recover damages because of failure on the part of a carrier to supply a sufficient number of cars. Thus the Court says:—

> "Upon a review of Sections 8 and 9 of the Act to Regulate Commerce and of the proviso in Section 22 which declares that 'nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies,' we held (page 130) that while the Act gave shippers new rights, it at the same time preserved existing causes of action; that it did not supersede the jurisdiction of State Courts in any case, new or old, where the decision *did not involve the determination of mat-*

> *ters calling for the exercise of the administrative power and discretion of the Commission* or relate to a subject as to which the jurisdiction of the Federal Courts had otherwise been made exclusive; that in actions against railroad companies for unjust discrimination in interstate commerce where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal Courts."

Clearly, therefore, the Commission is regarded as having exclusive jurisdiction where an administrative question is involved and since the recovery was sustained, it is manifest that the Supreme Court was of the opinion that such a question was not in the case.

Nor is the case of Pennsylvania R. R. Co. *vs.* Clark Coal Co., 238 U. S. 456 (1915) any authority for the jurisdiction of the Commission. That was a discrimination case, pure and simple, and indicates nothing as to the jurisdiction of the Commission in cases which do not involve—as the cases at bar do not—the discrimination feature.

If the court will consider the situation which would arise if the order of the Commission should be sustained and complaint be made of its violation, it will readily perceive the defective nature of the order. Could the Court determine for itself from the order of the Commission how many cars the complainant shippers should have per month, and if not, is the rule of conduct prescribed by the Commission of such definiteness as to justify the imposition of a penalty of $5000 per day? If there were a predicate for an order of this kind, it would

devolve on the Commission to determine the cars to be furnished so that the standard of conduct might be definite and certain. *This is the very essence of the administrative function,* and in rate cases it is well recognized. It would obviously be unlawful for the Commission to find an existing rate unreasonable and order the carrier to discontinue charging such rate and charge only what might be reasonable. *The administrative duty is to indicate what is a reasonable rate; and so, in this case, the administrative duty would be to indicate what would be a reasonable notice and a reasonable request, and what would be the normal shipments of the complainants, and a sufficient number of cars therefor.*

This consideration gains additional weight when reference is made to the decision of this Court in United States *vs.* Pacific and Arctic Company, 228 U. S. 87 (1913), in which it was pointed out that an indictment could not be maintained for unjust discrimination under the Act to Regulate Commerce in the absence of prior action by the Interstate Commerce Commission. It would seem to follow necessarily that the Court deemed it essential that there should be a finding by the Commission as to the evidence of the unjust discrimination. Similarly in the present case, if any question should arise as to whether the orders entered by the Commission in these cases have been complied with, it is difficult to conceive how the question involved could be more essentially an administrative one than the question involved in the Pacific and Arctic case. And yet, to refer it to the Commission would make that tribunal both legislator and judge and jury in the premises, a situation not conducive to a fair decision. Furthermore, the orders of the Commission are presumed to be enforceable in the Courts, but the considerations alluded to would indicate a necessity for further administrative action before the controversy could be then proceeded with.

In brief, what the Commission seeks to do is to declare that the obligation of the carrier to serve its patrons extends to the furnishing of a specialized vehicle, and then to add to the remedies adapted to the real common law obligation the extraordinary remedies intended to effectuate the Commis-

sion's authority over rates and similar collateral issues where experience has demonstrated the necessity for a specific form of redress.

IV. The order of the Commission is defective in that it requires the railroad company to supply cars for movement over the lines of other carriers.

As is stated in the opinion of the Commission, the Pennsylvania Paraffine Works and the Crew-Levick Company are located as well on the line of the New York Central System as on the line of the Pennsylvania System. The order of the Commission in terms requires The Pennsylvania Railroad Company to furnish cars to transport said complainants' normal shipments "in interstate commerce." The Commission may not have meant to require the Pennsylvania Railroad to furnish cars for shipment over the lines of the New York Central, but its language seems to require such action. Clearly this is unlawful. And it is of special consequence in view of the fact that the oil companies have evidenced a disposition to use the New York Central routes (R. 21-22).

Moreover, it is respectfully submitted that the Commission is not entitled to require The Pennsylvania Railroad Company to furnish cars for the movement of shipments to points beyond its own rails unless at the same time it provides terms and conditions on which such cars shall be delivered to the connecting carrier in order to insure to the Pennsylvania Railroad the proper liability on the part of other carriers for the return of the equipment. That an exertion of power such as is sought to be accomplished in this case is unlawful is decided by the Court of Civil Appeals of Texas in Gulf & C. R. R. Co. *vs.* Texas, 120 S. W. 1028 (1909). In a later case, G. H. & S. A. Ry. *vs.* Jones, 104 Texas, 92 (1912), the Supreme Court of Texas cites this case with approval and says:—

> "The charge (of the Court below) correctly tells the jury that the railroad company was not bound to permit its cars to go on the line of the second railroad company."

It is true that the case of Michigan Central Railroad Company *vs.* Michigan Railroad Commission, 236 U. S. 615 (1915) goes very far in the direction of sustaining an order requiring that a railroad permit its cars to go beyond its rails, but even in that case it is pointed out that reasonable compensation to the carrier whose cars are used in the interchange is provided for. It is respectfully submitted that the Commission cannot enter an order of this character requiring the carrier to furnish equipment to move freight beyond its own rails without taking some means to safeguard the rights of the owning carrier.

This feature of the case acquires, in the present proceeding, very unusual importance in consequence of the fact stated in the Commission's opinion that The Pennsylvania Railroad Company owns more tank cars than all the other carriers east of the Mississippi River combined. Its tank car ownership amounted at the time of the hearing to 499 cars. The total ownership of the other carriers east of the Mississippi River amounted to 303 cars, whereas the privately owned tank cars east of the Mississippi River amounted to 27,700. It therefore appears that the railroad ownership is less than 3 per cent. of the total ownership east of the Mississippi, and that of this 3 per cent. The Pennsylvania Railroad Company is furnishing more than half. If now it is compelled to furnish all the tank cars required for the transportation of oil from points on its line irrespective of their destination, it is obvious that a burden out of all proportion is placed upon this Company. As shown by the evidence in this case, oil was shipped even by these oil companies to destinations on the lines of other carriers, some in far distant points in the country. Clearly the statement on page 11 of the Government's brief that, "the destinations of practically all of the refiners' shipments were points on the line of the railroad company," is based on a misapprehension. No such statement appears on page 21 of the Record, the page cited. On page 20 it is stated that, "complainants

assert that defendant's line is *the most direct route* to nearly all of the destinations to which they are accustomed to ship"—a very different thing, since the *destinations* may well be, under this assertion as they actually are, frequently on the lines of other carriers. Furthermore, although the New York Central Railroad serves the complainants equally with the Pennsylvania Railroad and supplies no tank cars whatsoever, no order is made against it, but, on the contrary, the entire burden is devolved upon the Pennsylvania.

It is suggested by the Government (page 77 of the Government's brief) that it would be time to raise the objection when the railroad company should be requested to send one of its cars beyond the limits of its own lines; but this consideration overlooks the fact that the Commission's order must be construed in the light of its rulings and also in the light of the decision of this Court in the cases cited by the Government.

V. The order of the Commission requires an interference with the rights of owners of private cars.

In connection with this feature of the case, the Court's attention is respectfully asked to that portion of the Commission's opinion appearing on page 193:—

> "The record does not show such technical knowledge to be needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish cars. The fact that the defendant has for more than 20 years past been furnishing tank cars for the shipment of oil bears witness to the contrary. We see no particular hardship to defendant arising out of the necessity of allowing its equipment to move beyond its line. Further, the necessity of defendant's purchasing a large number of additional tank cars does not follow from our holding in the present case. The requirement of the act is that defendant provide and furnish, not necessarily buy, a reasonably adequate supply of cars, and the 13,-

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would be precipitated if the Commission's order should be interpreted to require the disregard of private ownership of cars it has been deemed proper to present this feature of the case for discussion in order that the true situation may be ascertained.

The opinion of the majority of the Commissioners and the brief of the Government disclose an effort to construct a case by placing in juxtaposition passages from the Act to Regulate Commerce and decisions of the courts which, when taken out of their proper setting and used without reference to their context, afford a partial resemblance to a foundation for the contentions which are made. And this structure is then sought to be reinforced by arguments as to the importance of avoiding discrimination.

It is frankly conceded that the elimination of discrimination was one of the great purposes of the Act to Regulate Commerce, but the Government's contentions in this regard are singularly devoid of any proper support in the present cases since there is not even the most remote suggestion of discrimination in the complaints which initiated the proceedings, and no finding by the Commission which by any interpretation can be made to imply that discrimination results to any one.

There is consequently no just basis, even in the most general point of view, for the extraordinary power sought to be exercised by the Commission, "a power," which, as Mr. Commissioner Bragg said in the Scofield case, "so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression, or necessary implication, and we find neither of these in the statute."

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OCTOBER 10, 1916.

APPENDIX.

DISSENTING OPINION OF MR. COMMISSIONER CLARK IN VULCAN COAL MINING CO. *vs.* I. C. R. R., 33 I. C. C. 520

"Clark, Commissioner, dissenting:

"The Commission is vested with broad powers and wide discretion. In part its duties are *quasi* judicial, but it is primarily and essentially an administrative body, exercising powers which are legislative in their nature and which are delegated to it by the Congress and are limited by the terms of the delegation. It is clearly our duty to observe and enforce the substantive and definite provisions of the act, with due consideration for the letter and the spirit of the law. The operation of the railroads is inseparably bound up with the commerce of the country. The demands upon the railroads are varied in their nature, and they vary greatly with changing conditions. It is therefore necessary, while observing the letter and the spirit of the law, to construe and administer it in workable ways and so that commerce and transportation will be promoted and not retarded.

"In so far as federal legislation and regulation go, the carriers have so far been left to exercise their own judgment in the construction of roads and the equipment thereof. The roads are built and operated by private owners and for financial profit. It is therefore presumed that a carrier will, in so far as it is able to do so, provide itself with such facilities as will on the whole permit it to serve its patrons and earn the largest possible revenue, with proper consideration for judicious investment and proper economies.

"The railroads are permitted to provide equipment by purchase, lease, or rental. In Interstate Commerce Commission *vs.* I. C. R. R. Co., 215 U. S. 452, it was held that a railroad's car supply may be legally suffi-

lateral branch lines of railroad or private side tracks, and to 'furnish cars for the movement of such traffic to the best of its ability.' This language seems to recognize the fact that the carrier may not, and probably will not, be able at all times to furnish desired cars, but it must furnish them 'to the best of its ability' and without discrimination between shippers.

"Section 7 of the Act prohibits carriers from preventing the carriage of freight from being continuous from the place of shipments to the place of destination by carriage in different cars, break of bulk, stoppage, or interruption, which is not made in good faith for some necessary purpose.

"Section 8 of the Act provides that if a carrier shall do anything prohibited, or omit to do anything required of it, by the Act, it shall be liable to the person injured for damages sustained in consequence thereof, together with reasonable counsel or attorney's fee, 'to be fixed by the court in every case of recovery.'

"In Section 20 of the Act it is provided that the Courts of the United States shall have jurisdiction upon the application of the Attorney General of the United States, at the request of the Commission alleging a failure to comply with, or violation of, and of the provisions of the Act, to issue writs of mandamus commanding such carriers to comply with any provision of the Act.

"Section 23 of the Act specifically confers upon the Federal Courts jurisdiction, upon the relation of any persons, firm, or corporation alleging such violation by a carrier of any provision of the Act as prevents the relator from having interstate traffic moved at the same rates charged, or on as favorable conditions as those given to, any other shipper, to issue a mandamus commanding a carrier 'to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ.' Such mandamus may issue notwithstanding any question of fact as to

proper compensation to the carrier is undetermined, upon such terms as to security for payment as to the Court may seem proper.

"Under the well-known conditions of transportation by railroad, and responsive to the plain intent of the law as expressed by the prohibition hereinbefore referred to against interruption to through shipments, and the requirement that carriers shall establish and maintain through routes and joint rates, it is essential that cars shall be freely interchanged between carriers. The varying conditions in different sections of the country at different seasons of the year and in different years render it, I believe, impracticable and impossible for the carrier which receives from a connection a loaded car to always deliver in return therefor an empty car. In addition to this there are multitudes of instances in which, and many times and seasons of the year when, such exchange of an empty for a load is neither desired nor desirable. The empty car may not be needed there, but may be badly needed at some other point or by some other connecting road.

"A carrier being required to be a party to through routes and joint rates and to facilitate the movement of shipments without carriage in different cars or breaking of bulk, it follows that it must permit its cars to go to such destinations as are selected by the shipper. It can have no accurate knowledge of what those destinations will be. The shipper will naturally select the market which is most advantageous to him. He may, therefore, ship in one direction at one time and in another direction at another time. If the carrier must respond in damages because of its inability to furnish cars at a time of unusual demand for cars, it seems to me that the right of that carrier to confine its equipment to its own rails must be recognized; but that right was specifically denied to the respondent in the instant case in Missouri & Illinois Coal Co. *vs.* I. C. R. R. Co., 22 I. C. C. 39.

"In the original Act, as well as in amendments

thereto which have broadened, extended, and strengthened the Commission's jurisdiction and powers, the Congress has carefully refrained from transferring to, or conferring upon, the Commission any jurisdiction or power which properly belongs to the judicial branch of the Government.

"For all of these reasons, together with the fact that the Commission's orders for the payment of money are only *prima facie* evidence in the Courts, in connection with which the Court may receive additional testimony which has not been presented to the Commission, I think that the question of requiring a carrier to provide itself with additional facilities or respond in damages for failure so to do is essentially a judicial question jurisdiction of which reposes in the Courts, which have authority to create and direct the conduct of receiverships, and not in the Commission, which has been created to exercise certain delegated powers legislative in character. I am, therefore, unable to agree with the majority report.

"I am authorized by Chairman Harlan and Commissioner Clements to say that they concur in these views."